Supreme Court, U. S.
FILED
JAN 4 1980
MICHAEL RODAK, JR., CLERK

NO.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,
AND
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PHILIP A. LACOVARA
JAY KELLY WRIGHT
WILLIAM R. STEIN
Hughes Hubbard & Reed
1660 L Street, N. W.
Washington, D.C. 20036

Attorneys for Petitioner
Northwest Airlines, Inc.

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
JURISDICTION 2
QUESTIONS PRESENTED 2
STATUTORY PROVISIONS INVOLVED 3
STATEMENT 3
A. The Sex Discrimination Suit Brought Against Northwest 3
B. Commencement Of The Present Lawsuit 6
C. The District Court's Decision 6
D. The Cross-Appeals 7
E. The Decision Of The Court Of Appeals 7
REASONS FOR GRANTING THE WRIT 9
I. WHETHER A UNION THAT VIOLATES THE EQUAL PAY ACT IS INSULATED FROM MONETARY LIABILITY IS A QUESTION OF GREAT IMPORTANCE ON WHICH THE CIRCUITS ARE IN CONFLICT AND WHICH THE COURT BELOW DECIDED IN A MANNER CONTRARY TO THIS COURT'S RECENT DECISIONS ON IMPLIED RIGHTS OF ACTION 9
A. The Issue Is Of Great Importance To The Public and Private Enforcement Of The Equal Pay Act 9
B. The Circuits Are In Conflict On The Issue 15
C. The Decision Below Fails To Examine Congressional Intent As Required By Prior Decisions Of This Court 16

II. THE EXISTENCE OF UNCERTAINTY ON IMPORTANT QUESTIONS RELATING TO ENFORCEMENT OF FEDERAL EMPLOYMENT DISCRIMINATION LAW WARRANTS REVIEW OF THE TITLE VII CONTRIBUTION ISSUES 18

A. There Is Lingering Conflict Over The Important Question Whether Their Can Be Contribution For Title VII Liability 19

B. Whether A Title VII Contribution Claim Is Barred If Not Asserted In The Original Proceeding Is A Question Of Great Importance To The Administration Of Federal Employment Discrimination Law 23

CONCLUSION 25

APPENDIX A: Statutory Provisions

APPENDIX B: Memorandum opinion of the district court, dated July 7, 1977

APPENDIX C: Order of the district court granting in part and denying in part the defendants' motion to dismiss, dated July 7, 1977

APPENDIX D: Opinion of the court of appeals, dated August 30, 1979

APPENDIX E: Order of the court of appeals, dated August 30, 1979

APPENDIX F: Order of the court of appeals dated October 5, 1979 vacating the order of August 30, 1979

APPENDIX G: Judgment of the court of appeals, dated October 5, 1979

APPENDIX H: Order of the court of appeals dated October 9, 1979 denying petition for rehearing

TABLE OF AUTHORITIES

Page

Cases

Albemarle Paper Co. v. Moody,
422 U.S. 405 (1975) 14,20,24

Alexander v. Gardner Denver Co.,
415 U.S. 36 (1974) 21

Bernard v. Gulf Oil Co.,
596 F.2d 1249 (5th Cir. 1979) 24

Blanton v. Southern Bell Telephone & Telegraph Co.,
49 F.R.D. 162 (N.D. Ga. 1970) 21

Bowe v. Colgate Palmolive Co.,
272 F. Supp. 332 (S.D. Ind. 1967), *modified on other grounds,* 416 F.2d 711 (7th Cir. 1969) 21

Cannon v. University of Chicago,
No. 77-926 (U.S. May 14, 1979) (47 U.S.L.W. 4549) .17,18

Carey v. Greyhound Bus Co. Inc.,
500 F.2d 1372 (5th Cir. 1974) 20

Christiansburg Garment Co. v. EEOC,
434 U.S. 412 (1978) 14

Cooper Stevedoring Co. v. Fritz Kopke, Inc.,
417 U.S. 106 (1974) 20,23

Costello v. United States,
365 U.S. 265 (1961) 24

Denicola v. G.C. Murphy Co.,
562 F.2d 889 (3d Cir. 1977) 15

Gilbert v. General Electric Co.,
59 F.R.D. 267 (E.D. Va. 1973) 21

Gillespie v. United States Steel Corp.,
379 U.S. 148 (1964) 19

Glus v. G.C. Murphy Co.,
562 F.2d 880 (3d Cir. 1977) 22

Grogg, v. General Motors Corp.,
72 F.R.D. 523 (S.D.N.Y. 1976) 21

Harden v. Illinois Bell Telephone Co.,
No. 74 C 1505 (N.D. Ill. 1975) 22

Hodgson v. Baltimore Regional Joint Board,
462 F.2d 180 (4th Cir. 1972) 15

Hodgson v. Sagner, Inc.,
462 F.2d 180 (4th Cir. 1972),
affirming 326 F. Supp. 371 (D. Md. 1971) 11,12,15

Hodgson v. Wheaton Glass Co.,
446 F.2d 527 (3d Cir. 1971) 11

International Union of Electrical, Radio & Machine Workers v. Westinghouse Electric Corp.,
73 F.R.D. 57 (W.D.N.Y. 1976) 21

Laffey v. Northwest Airlines, Inc.,
366 F. Supp. 763 (D.D.C. 1973) 3

Laffey v. Northwest Airlines, Inc.,
374 F. Supp. 1382 (D.D.C. 1974) 3

Laffey v. Northwest Airlines, Inc.,
567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434
U.S. 1086 (1978) ..... *passim*

Land v. Dollar,
330 U.S. 731 (1947) 19

Larson v. Domestic & Foreign Commerce Corp.,
337 U.S. 682 (1949) 19

Los Angeles Department of Water and Power v. Manhart,
435 U.S. 702 (1978) 14

Lynch v. Sperry Rand Corp.,
62 F.R.D. 78 (S.D.N.Y. 1973) 21

Mitchell v. DeMario Jewelry,
361 U.S. 288 (1960) 11

Mitchell v. Riley,
296 F.2d 614 (5th Cir. 1961) 11

Myers v. Gillman Paper Corp.,
544 F.2d 837 (5th Cir.), *vacated and remanded on other grounds on rehearing*, 556 F.2d 758 (5th Cir.), *cert. dismissed*, 434 U.S. 801 (1977)..... 20,22,23

Northwest Airlines, Inc. v. Transport Workers Union of America,
82 Lab. Cas. ¶33,549, 14 Empl. Prac. Dec. ¶7730 (D.D.C. 1977), *aff'd in part and remanded in part*, 606 F.2d 1350 (D.C. Cir. 1979)..... 1

Osborne v. McCall Printing Co.,
4 F.E.P. Cases 276 (S.D. Ohio 1972)..... 21

Parson v. Kaiser Aluminum & Chemical Corp.,
575 F.2d 1374 (5th Cir. 1978)..... 20,23

Patterson v. American Tobacco Co.,
535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976)..... 20

Sinyard v. Foote and Davies Division of McCall Corp.,
577 F.2d 943 (5th Cir. 1978)..... 15,16

Stevenson v. International Paper Co.,
432 F. Supp. 390 (W.D. La. 1977)..... 21

Torockio v. Chamberlain Manufacturing Co.,
51 F.R.D. 517 (W.D. Pa. 1970)..... 21

Trafficante v. Metropolitan Life Insurance Co.,
409 U.S. 205 (1972)..... 14

Transamerica Mortgage Advisers, Inc. v. Lewis,
No. 77-1645 (U.S. November 13, 1979) (48 U.S.L.W. 4001)..... 16

United States v. General Motor Corp.,
323 U.S. 373 (1945)..... 19

Writz v. Hayes Industries, Inc.,
1 Empl. Prac. Dec. ¶9874 (N.D. Ohio 1968)..... 15

Younger v. Glamorgan Pipe & Foundry Co.,
418 F. Supp. 743 (W.D. Va. 1976), *vacated and remanded on other grounds*, 561 F.2d 563 (4th Cir. 1977)..... 22

Statutes

Judiciary and Judicial Procedure Act
28 U.S.C. §1254(1) 2
28 U.S.C. §1292(b) 7,8

Equal Pay Act of 1963
29 U.S.C. §206(d) 2,3,10,14
29 U.S.C. §216(a)-(d) 3,10,11,14,16
29 U.S.C. §217 3,11,16

Title VII of Civil Rights Act of 1964
42 U.S.C. §§2000e *et seq.* ..... *passim*
Section 703(c)(3), 42 U.S.C. §2000e-2(c)(3) 20,21
Section 706(g), 42 U.S.C. §2000e-5(g) 14,20,21

Fair Labor Standards Act
29 U.S.C. §255(a)..... 14

Rules and Regulations

Fed. R. Civ. P. 14a..... 25

Fed. R. Civ. P. 54(b) 7,9

Equal Pay For Equal Work Under The Fair Labor Standards Act, 29 C.F.R. §800.106 (1979)..... 10,18

Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978)..... 13

Miscellaneous

109 Cong. Rec. 9197 (1963) 17

109 Cong. Rec. 9209 (1963) 18

Administrative Office of the U.S. Courts, *1979 Annual Report of the Director* (1979) 22

3 J. Moore, Federal Practice ¶14.03(3) (2d ed. 1979)..... 24

3 J. Moore, Federal Practice ¶14.0363 (2d ed. 1979)..... 24

W. Prosser, *Law of Torts* (4th ed. 1971)..... 20,24

Restatement (Second), *Torts* §886A(2) (1979) 24

B. Schlei & P. Grossman, *Employment Discrimination Law* (1976)..... 20

U.S. Department of Labor, *Report to Congress: Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act* (1979) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

AND

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Northwest Airlines, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on October 5, 1979.

OPINIONS BELOW

The opinion of the district court (App. B) is reported at 82 Lab. Cas. ¶33,549, and 14 Empl. Prac. Dec. ¶7730 (D.D.C. 1977). The opinion of the court of appeals (App. D) is reported at 606 F.2d 1350 (D.C. Cir. 1979).

JURISDICTION

On August 30, 1979, the court of appeals entered an order (App. E) affirming in part and remanding the record. Northwest filed a timely petition for rehearing on September 13, 1979. On October 5, 1979, the court *sua sponte* vacated (App. F) the August 30 order and entered a judgment (App. G) affirming in part and remanding the case. The petition for rehearing was denied on October 9, 1979 (App. H). This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a labor union that violates the Equal Pay Act of 1963, 29 U.S.C. §206(d)(2), by causing an employer to discriminate in wages on the basis of sex is nevertheless immune from the employer's claim for contribution for a portion of the damages assessed.

2(a). Whether an employer has a right to contribution from a labor union that is directly liable to employees for violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, for participating in a discriminatory collective bargaining agreement.

(b). If so, whether an employer's claim for contribution based on the union's Title VII liability may be barred because the claim was not asserted at the outset of the action brought by the employees.

STATUTORY PROVISIONS INVOLVED

Set forth in Appendix A are the pertinent provisions of the statutes involved, the Equal Pay Act of 1963, 29 U.S.C. § §206(d), 216(a)-(d), 217, and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*

STATEMENT

This case presents important questions concerning the liability of labor unions for violations of the federal employment discrimination laws. The respondents, the Transport Workers Union of America ("TWU") and the Air Line Pilots Association ("ALPA"), are labor unions that were certified as the collective bargaining representative of cabin attendants employed by petitioner Northwest Airlines.[1]

A. The Sex Discrimination Suit Brought Against Northwest

This case has its origin in *Laffey v. Northwest Airlines, Inc.*, a large class action brought against Northwest in 1970 by its female cabin attendants.[2] Among the employment

[1]TWU was the authorized representative from 1961 until September 1971. ALPA was the authorized collective bargaining representative of the Northwest cabin attendants from September 1971 through 1976.

[2]The district court issued an opinion finding liability in 1973, *Laffey v. Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C. 1973). A decree awarding backpay and injunctive relief followed in 1974. 374 F. Supp. 1382 (D.D.C. 1974). The district court's decree was affirmed in part and vacated in part by the court of appeals, 567 F.2d 429 (D.C. Cir. 1976), and this Court denied certiorari, 434 U.S. 1086 (1978). Various aspects of the *Laffey* suit remain pending in the district court and the court of appeals.

practices challenged in *Laffey* was the then-existing wage scale for cabin attendants. Under collective bargaining agreements with the cabin attendants' union, one classification of cabin attendants—pursers—received a higher rank and rate of pay than cabin attendants in the other two classifications—stewardesses and flight service attendants ("FSA's").

The higher pay and rank for pursers under the agreements reflected their supervisory responsibilities over the other cabin attendants. The stewardess and FSA positions were defined as equal in rank and were paid on the same wage scale, lower than that of pursers. Prior to 1967, only men were eligible for promotion to purser. Among the other cabin attendants, men held the title FSA and women held the designation stewardess in equally ranked and equally paid jobs.

The pay differential that formed the basis for the *Laffey* claims had been maintained and preserved through collective bargaining, with the active participation of the cabin attendants' union. The agreements defined the duties of the cabin attendants in each classification, and these descriptions were examined and revised periodically in bargaining. Year after year in contract negotiations, the unions made demands for further increases in the wages of all cabin attendants that preserved or increased the size of the purser wage differential attributed to the extra duties assigned to pursers under the agreements. The unions never suggested reducing or eliminating the differential.

In the *Laffey* suit, the stewardesses attacked the pay differential between the purser and the lower-ranking classifications. They alleged that all Northwest cabin attendants really performed "equal" work and that, by paying stewardesses (as well as male FSA's) less than male

pursers, Northwest was discriminating against stewardesses on the basis of sex. The pay differential was alleged to violate the sex-discrimination provisions both of the Equal Pay Act of 1963 and of Title VII.

A year after the lawsuit was commenced, the *Laffey* plaintiffs moved to join as a party the union that was representing Northwest cabin attendants at the time of the motion, ALPA, in order to effectuate any prospective injunctive relief that might require modifications in the collective bargaining agreement. The plaintiffs, however, refrained from asserting any monetary claims against TWU or its successor, ALPA, which also negotiated one of the contracts later held to be discriminatory. This strategy was not surprising, since the plaintiff class in *Laffey* constituted a majority of the members of the unions and even included members of the union leadership at the time the relevant collective bargaining agreements were negotiated.[3]

After a trial, the district court found that the contractually defined job differences were insufficient to justify the wage differentials agreed upon in collective bargaining by TWU before the suit and by ALPA in the 1972 contract. As a result, the court concluded that the differential constituted sex discrimination in violation of both the Equal Pay Act and Title VII. The district court's decree, later sustained by the court of appeals, awarded back pay to several thousand stewardesses in the amount of the differential. The awards in *Laffey* subject Northwest to a backpay liability that may ultimately reach as much as $50,000,000, making it one of the largest awards—perhaps the largest—ever rendered in an employment discrimination case.

---

[3]The stewardesses covered by the plaintiff class had always enjoyed overwhelming numerical superiority in the cabin attendants' unions. The lead *Laffey* plaintiff had been an officer of one union and had participated actively in collective bargaining.

B. Commencement Of The Present Lawsuit.

For procedural reasons, the district court in *Laffey* refused to entertain Northwest's cross-claims and third-party claims against ALPA and TWU in that suit. Northwest then filed the present suit against the unions in 1975, charging them with concurrent responsibility for the contractual pay differential held unlawful in *Laffey*. Northwest sought declaratory relief entitling it to contribution from the unions for their fair share of the *Laffey* backpay award attributable to the purser wage differential that the unions themselves had supported and perpetuated.

C. The District Court's Decision.

With respect to the Equal Pay Act, the district court agreed with the unions' contentions that they have no direct exposure to monetary liability under that Act and, therefore, are not subject to a claim for contribution. The court dismissed that claim.

On the Title VII claim, however, the district court upheld Northwest's position. Since Title VII expressly provides for a damage remedy against unions, the district court recognized that an employer and a union may have concurrent liability and concluded that an employer has a right of contribution against a union for a share of the liability under Title VII:

> "If, as Northwest claims, defendants caused it to discriminate, under a no contribution rule, the entire burden of a judgment of potentially $24,400,000 [the initial estimate of liability without including interest or double damages under the Equal Pay act] will fall on Northwest, while the unions will get off 'scot-free.'

Allowing contribution here will force each party to bear its fair share, and only its fair share, of the loss they have caused the *Laffey* plaintiffs." (App. B, p. 16b).

D. The Cross-Appeals.

The unions obtained a certification pursuant to 28 U.S.C. §1292(b), permitting them to appeal the district court's refusal to dismiss the claim for contribution under Title VII. In order to bring up the Equal Pay Act claim at the same time, Northwest then sought, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the entry of a separate final judgment on the court's order dismissing its claim for contribution under that Act.[4]

The court of appeals invited the EEOC to participate as *amicus curiae.* The EEOC took the position that federal law permits an employer to obtain contribution from a union if both are responsible for a Title VII violation, but argued that an employer's claim for contribution should be barred if not asserted early in the employees' original suit.

E. The Decision of the Court of Appeals.

In the *Laffey* appeal, the court of appeals had stated flatly that a union has monetary exposure under the Equal Pay Act: If a union "contributed to the discriminatory scheme [in violation of the Equal Pay Act], the claimant [employee]

---

[4]The district court ordered the entry of final judgment on the Equal Pay Act contribution claim "if the court of appeals chooses to hear the unions' interlocutory appeal. . . ." When the court of appeals accepted the unions' interlocutory appeal, the district court then entered final judgment against Northwest on the Equal Pay Act claim.

has a cause of action against the union as well." *Laffey v. Northwest Airlines, supra,* 567 F.2d at 447.

In *this* case, however, the court below did a complete about face. Unions are not liable to employees, the court concluded, because there is no express provision in the Equal Pay Act permitting employees to sue unions even though the Act expressly forbids unions to cause discriminatory wage levels. That omission, the court of appeals concluded, "insulates unions from suits by employees." (App. D, p. 9d). Accordingly, the court held, there could be no contribution claim by an employer (App. D, p. 12d), and it affirmed the final judgment dismissing Northwest's Equal Pay Act claim.

When it turned to Northwest's claim for contribution for Title VII liability, the court of appeals did another about face. It declined to address any of the issues that it had specially ordered the parties (and enlisted the EEOC) to brief when it allowed the interlocutory appeal. Without questioning the district court's certification under 28 U.S.C. §1292(b) or its own acceptance of the unions' appeal, the court of appeals nevertheless ignored the question certified. Instead, the court remanded the case to allow the district court to consider a "laches" issue that, as the court acknowledged, the unions had raised for the first time on appeal. (App. D, p. 12d).

As a result of the muddled action taken below, the Title VII contribution claim is now in limbo. Further proceedings will be necessary on a claim whose legal sufficiency is in doubt while the district court and the parties explore novel ideas for procedural obstacles to the claim. Meanwhile, Northwest's Equal Pay Act contribution claim stands dismissed, despite the fact that the district court entered final judgment on that claim only to complement appellate review

of the Title VII issue, an issue that the court of appeals ultimately declined to address. Unless review is granted now, the Rule 54(b) judgment dismissing the Equal Pay Act claim may become final and unreviewable at any later stage of these proceedings.

REASONS FOR GRANTING THE WRIT

I.

WHETHER A UNION THAT VIOLATES THE EQUAL PAY ACT IS INSULATED FROM MONETARY LIABILITY IS A QUESTION OF GREAT IMPORTANCE ON WHICH THE CIRCUITS ARE IN CONFLICT AND WHICH THE COURT BELOW DECIDED IN A MANNER CONTRARY TO THIS COURT'S RECENT DECISIONS ON IMPLIED RIGHTS OF ACTION.

A. The Issue Is Of Great Importance To The Public And Private Enforcement Of The Equal Pay Act.

In denying the existence of an employer's claim for contribution against a union, the court below relied exclusively on its conclusion that a union does not have any direct monetary liability to the employees for the damages it causes them in violation of the Equal Pay Act. That premise highlights the importance of this case. The result below is inconsistent with cases imposing monetary liability on unions for violating the Equal Pay Act and it frustrates the remedial purposes of the Act.

The Equal Pay Act of 1963, which is a part of the Fair

Labor Standards Act ("FLSA"), prohibits wage discrimination on the basis of sex. The Act prohibits discrimination both by employers and by unions. 29 U.S.C. §206(d)(1) provides that:

> "No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work. . . ."

Section 206(d)(2) imposes a related prohibition upon unions:

> "No labor organization, or its agents, representing employees . . . shall cause or attempt to cause . . . an employer to discriminate against an employee in violation of paragraph (1) . . . ."

Ever since the Labor Department first issued regulations under the Equal Pay Act, the Department has emphasized that unions bear equal responsibilities under the Act. It is the Labor Department's position that Section 206(d)(2) manifests

> "the legislative intent that in situations where wage rates are governed by collective bargaining agreements, *unions* representing the employees shall *share with the employer the responsibility for ensuring* that the wage rates required by such agreements will not cause the employer to make payments that are not in compliance with the equal pay provisions." 29 C.F.R. §800.106 (1979) (emphasis added).

Before the Equal Pay Act was added in 1963, the FLSA was exclusively minimum wage and maximum hour legislation. It already contained provisions imposing monetary liability for violations. For example, 29 U.S.C. §216(b) provides that an employer is liable to employees for "unpaid

minimum wages" or "unpaid overtime compensation. . . ." Under Sections 216(c) and 217 the Secretary of Labor is authorized to sue to recover unpaid minimum wages or overtime compensation due any employee. A recovery of back compensation by the Secretary is ultimately made available to the employees. *See, e.g., Mitchell v. DeMario Jewelry,* 361 U.S. 288 (1960); *Hodgson v. Wheaton Glass Co.,* 446 F.2d 527 (3d Cir. 1971); *Mitchell v. Riley,* 296 F.2d 614 (5th Cir. 1961).

When the Equal Pay act was added to the FLSA, Congress had to provide for administration and enforcement of the new anti-discrimination provisions. It did so by providing in Section 206(d)(3) that an unlawful, sex-based wage differential would be deemed to give rise to a claim for "unpaid minimum wages or unpaid overtime compensation. . . ." This approach allowed Congress to make applicable to Equal Pay Act violations the express liabilities and remedies provided in the FLSA without actually rewriting those provisions.

Against this backdrop the Secretary of Labor has not hesitated to assert that union violations of the Equal Pay Act give rise to monetary liability, even though Congress did not amend the FLSA expressly to provide for monetary liability of unions. His position has been sustained in the federal courts.

For example, in *Hodgson v. Sagner, Inc.,* 326 F. Supp. 371 (D. Md. 1971), *aff'd per curiam on opinion below,* 462 F.2d 180 (4th Cir. 1972)—a case relied upon by the court of appeals in *Laffey* when it approved the principle of union liability, 567 F.2d at 447 n.112—the Secretary sued both the employer and the union, alleging violations of the Equal Pay Act and seeking backpay from both defendants. Although the union argued that it was insulated from

liability, the court rejected that position:

> "There is no apparent reason why a union which violates Section 206(d) should be treated any differently from an employer violator. Equitably, both should be subject to the same type of decree, which in order to give full relief would necessarily include a provision requiring the payment of wages illegally withheld or caused to be withheld. . . ." 326 F. Supp. at 373.

In an apparent effort to mask the significance of the decision below, the court of appeals purported not to decide "definitely" (App. D, p. 10d) whether a union has monetary liability in a suit brought by disadvantaged employees. Nevertheless, the court stated that it is "improbable that an employee would ever have an implied cause of action under the Equal Pay Act against his union" and that the possible existence of this implied right was "remote." (App. D, pp. 9d-10d).

But if a union may be liable to the Secretary of Labor for money damages that the Secretary then pays over to the injured employees, there is no reason to think that Congress intended that, when employees sue directly, the union should escape liability entirely and that an employer should bear the full financial loss. If the court below was correct in denying an employer a right to contribution because Congress purportedly did not intend to "create liability on the part of the union for the benefit of employees" (App. D, p. 10), that same rationale would bar the Secretary from pursuing backpay liability on their behalf.

Authoritative resolution of the question of union liability is of great importance to the administration of the Equal Pay Act and will have significant economic consequences. Since enactment of the Equal Pay Act, the Secretary of Labor has pursued thousands of investigations and lawsuits on behalf of over 272,000 employees, resulting in recoveries in excess

of $163 million. *See* U.S. Department of Labor, *Report to Congress: Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act* 35 (1979). Yet the decision below that unions are insulated from monetary liability under the Equal Pay Act casts considerable doubt over the government's authority to pursue backpay awards on behalf of employees.

As the *Laffey* case illustrates, there are also many private lawsuits filed under the Equal Pay Act. Enforcement of the Equal Pay Act depends critically on private suits. The decision below, however, blocks the imposition of monetary liability on unions, whether in suits by the employees directly affected or in contribution actions by employers. The decision enables unions to escape the financial consequences of their own discriminatory acts, even though their conduct is expressly outlawed by the Act.

In sum, employees, employers, unions and federal enforcement authorities all need to know whether unions are subject to monetary liability when they violate their duties under the Equal Pay Act.[5]

The existence of a union's backpay liability under the Equal Pay Act is important even if it is subsequently determined that an employer may obtain contribution against a union for Title VII liability. Although both the Equal Pay Act and Title VII prohibit unions from causing sex-based wage discrimination, the Equal Pay Act affords

---

[5]This is a particularly opportune time for the Court to address the issue whether labor unions enjoy some special immunity. Governmental enforcement authority for the Equal Pay Act was recently transferred from the Secretary of Labor to the EEOC. *See* Reorganization Plan No. 1 of 1978, §1, 43 Fed. Reg. 19807 (1978). As a new agency takes over enforcement of this statute, the important question of union monetary liability should be clarified for it as well as for the interested parties in the private sector.

several procedural and substantive advantages to injured employees that may increase their recovery. These advantages include a more favorable statute of limitations (*compare* 29 U.S.C. §255(a) *with* 42 U.S.C. §2000e-5(g)) and a unique provision for double damages (29 U.S.C. §216(b)). In addition, full backpay under the Equal Pay Act is automatic, but under Title VII a court has discretion to reduce the amount of backpay awarded or to deny backpay entirely. *See Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 718-23 (1978); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

Finally, the Equal Pay Act, 29 U.S.C. §206(d)(1), provides for computing backpay under an upward equalization formula that does not apply to a Title VII claim. This may allow Equal Pay Act claimants "more than their due" under Title VII standards. *See Los Angeles Department of Water and Power v. Manhart, supra*, 435 U.S. at 720 n.36. Thus, employees have special incentives to pursue sex-discrimination claims under the Equal Pay Act as "private attorneys general," supplementing governmental enforcement. *Cf. Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416-17 (1978); *Albemarle Paper Co. v. Moody, supra*, 422 U.S. at 415; *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 211 (1972). The decision below insulating unions from liability skews all Equal Pay Act enforcement toward employers alone.

It is obviously important whether employees may hold unions accountable for violating their obligations under the Equal Pay Act. The therapeutic impact of this liability would make itself felt where, for example, the discriminating union has been ousted or where an international union that was involved in negotiating a discriminatory contract has greater financial resources than the small employer. From

the employers' standpoint, the issue of union liability for contribution under the Equal Pay Act is of special importance when a court awards double ("liquidated") damages, as the *Laffey* plaintiffs have demanded.

B. The Circuits Are In Conflict On The Issue.

The decision below will have enormous impact upon employers who are unlucky enough to become embroiled in Equal Pay Act litigation in a circuit that does not recognize contribution. Other courts, however, have found this result unjust and inconsistent with the statutory obligations imposed on unions by the Equal Pay Act.

As recognized in *Denicola v. G.C. Murphy Co.*, 562 F.2d 889, 893-94 (3d Cir. 1977)—the only other appellate decision in accord with the decision below—there is a split of authority on the issue. The decision below is in conflict with that of the Fourth Circuit in *Hodgson v. Baltimore Regional Joint Board*, 462 F.2d 180, 181 (4th Cir. 1972), which adopted the district court's opinion in *Hodgson v. Sagner*, discussed above, and upheld its action "in imposing such liability upon the Union." *See also Wirtz v. Hayes Industries*, 1 Empl. Prac. Dec. ¶9874 (N.D. Ohio 1968) (indicating that contribution may be allowed).

The holding below also conflicts with the rule established for the Fifth Circuit in *Sinyard v. Foote and Davies Division of McCall Corp.*, 577 F.2d 943 (5th Cir. 1978). There employees sued both their employer and their unions alleging violations of both Title VII and the Equal Pay Act. The Fifth Circuit stated unambigously:

> "[L]abor unions must bear a heavy responsibility in giving effect to the remedial provisions of both Title VII *and the Equal Pay Act.* International unions, along

with regional and local unions, may incur liability for discriminatory effects of contract provisions found in collective bargaining agreements." 577 F.2d at 945 (emphasis added).

With the circuits thus in disarray about the existence of union liability under the Equal Pay Act, the decision below exonerating the unions from direct or indirect financial responsibility provides a compelling occasion to introduce some consistency into this important field.

C. The Decision Below Fails To Examine Congressional Intent As Required By Prior Decisions Of This Court.

On a number of occasions in recent Terms, this Court has undertaken to determine when private rights of action should be implied under federal statutes. *See, e.g., Transamerica Mortgage Advisors, Inc. v. Lewis,* No. 77-1645 (November 13, 1979) (48 U.S.L.W. 4001, 4002), and cases cited there. The question is "whether Congress intended to create the private remedy asserted;" that intent "may appear implicitly in the language or structure of the statute or in the circumstances of its enactment." *Id.*, 48 U.S.L.W. at 4002, 4003. The decision below reaches the wrong result on an important issue of federal law after failing to pursue the necessary inquiry.

Although the decision below was nominally based upon congressional intent, the court of appeals relied entirely upon the absence of any *explicit* reference to unions in the remedial provisions of the FLSA, 29 U.S.C. §§216, 217. This approach is flatly inconsistent with this Court's recent decisions that the absence of an explicit claim in favor of private parties is not dispositive; rather, a thorough examination of the relevant legislative history is crucial. For

example, only last Term in *Cannon v. University of Chicago,* No. 77-926 (May 14, 1979) (47 U.S.L.W. 4549), the Court, after carefully examining the legislative history, concluded that there is an implicit basis for holding educational institutions liable in damages to students injured by violations of Title IX of the Civil Rights Act of 1964.

Like Title IX, the Equal Pay Act imposes an unequivocal obligation on employers and unions alike for the special benefit of a protected class—here, the employees. As with Title IX, congressional debates on the Equal Pay Act amply demonstrate an intent that unions bear full and equal responsibility for Equal Pay Act violations and that employers be permitted to enforce that responsibility.[6]

Although Congress did not rewrite the remedial provisions of the FLSA to provide explicitly for backpay actions against unions in Equal Pay Act cases, it is understandable why no specific provision for unions was made. Congress was merging Equal Pay Act enforcement into the general scheme of FLSA remedies. Those preexisting remedial provisions addressed only suits against employers, since, when the FLSA was initially passed, the Act imposed duties only on employers. But when the Equal Pay Act was added to the FLSA in 1963, imposing explicit

---

[6]For example, the chairman of the House subcommittee that drafted the measure passed by Congress expressed the congressional intention that unions be subject to damage suits at the instance of employees or employers:

> "Mr. Chairman, I might emphasize that where there is a charge of discrimination, no action can be taken by the Secretary if that discrimination persists, except following an action initiated by him, or it could be initiated by the employee *or the employer* in a Federal district court."

109 Cong. Rec. 9197 (1963) (remarks of Rep. Thompson) (emphasis added).

statutory obligations on unions for the first time, Congress assumed and intended that unions would be subject to the same sanctions for statutory violations as are employers. The prohibition against union-caused discrimination was not to be purely precatory.[7]

As this Court remarked in *Cannon*, "not only the words and history" of the statute, but also "its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination." 47 U.S.L.W. at 4557. The decision below, departing so dramatically from the analysis approved by this Court in *Cannon*, should receive plenary review.

II.

THE EXISTENCE OF UNCERTAINTY ON IMPORTANT QUESTIONS RELATING TO ENFORCEMENT OF FEDERAL EMPLOYMENT DISCRIMINATION LAW WARRANTS REVIEW OF THE TITLE VII CONTRIBUTION ISSUES.

The court below chose to sidestep an important issue of federal law, one that is crucial to the proper assessment and

---

[7]Note the following statement made during an exchange between Rep. O'Hara of Michigan and Rep. Goodell of New York, the bill's principal sponsor:

> "It is my understanding, as it is the understanding of the gentleman from New York [Rep. Goodell] that if a labor organization is in any way at fault in maintaining such a discriminatory wage rate, they would be subject to *all the penalties and all the enforcement provisions* provided under the Fair Labor Standards Act."

109 Cong. Rec. 9209 (1963) (remarks of Rep. O'Hara) (emphasis added).

See also 29 C.F.R. §800.106 (unions "share with the employer the responsibility for ensuring" that no discriminatory wage rates are paid).

allocation of liability under Title VII, and one that has never been decided by this Court. That issue is whether a union may be liable for contribution to an employer who must pay backpay for violations of Title VII founded on the provisions of a collective bargaining agreement. In bypassing that question, the court below framed a related issue: whether an employer's contribution rights are barred if they are not asserted before the initial adjudication of the employer's liability in the suit brought by the employees.

These issues are ripe for decision by this Court. The Title VII question is a clear-cut and extremely important issue of federal law that should be considered and decided at the same time as the analogous issue under the Equal Pay Act.[8] With the Equal Pay Act issue the subject of a final judgment and unquestionably ripe for review, it makes little sense to fragment this case by severing and deferring the cognate issues under Title VII. Moreover, the Title VII issues have independent significance meriting prompt review because, unlike the Equal Pay Act, Title VII covers not only employment discrimination claims based on sex but also those founded on race, color, and religion.

A. There Is Lingering Conflict Over The Important Question Whether There Can Be Contribution For Title VII Liability.

There should be little doubt that a federal common law right to contribution exists in favor of employers against unions that have caused violations of Title VII or otherwise

---

[8] *Cf. United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949).

actively participated in them, especially violations that are rooted in the provisions of freely negotiated collective bargaining agreements. The accepted principles of contribution require only two elements: (1) that tortfeasors have common liability to the injured party, and (2) that the party seeking contribution would otherwise pay more than its fair share. *See Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974); W. Prosser, *Law of Torts* §50 (4th ed. 1971). Northwest's claim for contribution under Title VII satisfies both elements.

Section 703(c)(3) of Title VII, 42 U.S.C. §2000e-2(c)(3), expressly forbids unions to "cause an employer to discriminate." Not leaving a remedy to implication as under the Equal Pay Act, Section 706(g) specifically provides that backpay shall be "payable by the employer . . . or *labor organization*, as the case may be, responsible for the unlawful employment practice." 42 U.S.C. §2000e-5(g). Indeed, in *Albemarle Paper Co. v. Moody, supra*, this Court noted that "the reasonably certain prospect of a back pay award" would act as a "spur or catalyst" to cause "employers *and unions*" to eliminate discrimination. 422 U.S. at 417-418 (emphasis added).

As a consequence, an "extensive and consistent line of authority" in the lower federal courts establishes that a union may be liable with an employer for discrimination caused in whole or in part by a collective bargaining agreement, and that the concurrent culpability "requires the union to share any back pay liability. . . ." *See* B. Schlei & P. Grossman, *Employment Discrimination Law* 560 (1976).[9]

---

[9] *See, e.g., Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374 (5th Cir. 1978); *Myers v. Gillman Paper Corp.*, 544 F.2d 837 (5th Cir.), *vacated and remanded on other grounds on rehearing*, 556 F.2d 758, *cert. dismissed*, 434 U.S. 801 (1977); *Patterson v. American Tobacco Co.*, 535 F.2d 257(4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1976); *Carey v. Greyhound Bus Co., Inc.*, 500 F.2d 1372 (5th Cir. 1974).

Given common backpay liability under Title VII, there is no reason why the general rule of contribution should not apply between employers and unions. Permitting contribution under these circumstances enhances the statutory goal, reflected in Sections 703(c)(3) and 706(g), that a union should shoulder some of the cost of monetary relief to the extent that it is responsible for a Title VII violation. Both the district court below and the EEOC agreed that federal law should recognize this right to contribution.[10]

The crucial question presented by this case has far-reaching ramifications, but it has never been settled by this Court. While most federal courts faced with the question have held that a right of contribution exists under Title VII,[11]

---

[10]Despite the unions' arguments below, the decision by the plaintiff employees in *Laffey* not to name the unions in the charges they filed with the EEOC or to join them as defendants in the *Laffey* suit should not bar a claim for contribution. The legislative history of Title VII makes clear that its procedures were not intended to foreclose or cut off rights against "third parties" such as unions. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

As the EEOC pointed out below, the procedural requirements of Title VII do not apply to a separate claim for contribution in which a named employer asserts an equitable claim for reimbursement from an unnamed but concurrently responsible union.

[11]*See, e.g., Parson v. Kaiser Aluminum & Chemical Corp., supra; Stevenson v. International Paper Co.*, 432 F. Supp. 390 (W.D. La. 1977); *International Union of Electrical, Radio & Machine Workers v. Westinghouse Electric Corp.*, 73 F.R.D. 57 (W.D.N.Y. 1976); *Grogg v. General Motors Corp.*, 72 F.R.D. 523 (S.D.N.Y. 1976); *Lynch v. Sperry Rand Corp.*, 62 F.R.D. 78 (S.D.N.Y. 1973); *Gilbert v. General Electric Co.*, 59 F.R.D. 267 (E.D. Va. 1973); *Osborne v. McCall Printing Co.*, 4 F.E.P. Cases 276 (S.D. Ohio 1972); *Blanton v. Southern Bell Telephone & Telegraph Co.*, 49 F.R.D. 162 (N.D. Ga. 1970); *Torockio v. Chamberlain Manufacturing Co.*, 51 F.R.D. 517 (W.D. Pa. 1970); *Bowe v. Colgate Palmolive Co.*, 272 F. Supp. 332 (S.D. Ind. 1967), *modified on other grounds*, 416 F.2d 711 (7th Cir. 1969).

several courts have gone the other way.[12] Moreover, in struggling to avoid reaching the Title VII issue, the court of appeals in this case termed this a "complex and sensitive question. . . ." (App. D., p. 12). The absence of definitive guidance from this Court, therefore, has created significant uncertainty about the existence and contours of a contribution claim based on concurrent employer/union liability under Title VII.

This important issue surely merits the Court's attention. More than 5,000 employment discrimination suits are filed *each year* in the federal courts. *See* Administrative Office of the U.S. Courts, *1979 Annual Report of the Director,* Table 30 at 71 (1979). Many hundreds of millions of dollars of liability have been assessed against employers in suits of this type, and more will be claimed from employers in the future. Thus, a huge volume of cases and an enormous amount of liability will turn on whether a "fair share" of the financial liability deliberately imposed on unions by Congress under Title VII may be allocated to those unions that cause or participate in discrimination but are not sued directly.

Perhaps more importantly, a determination whether an employer has a contribution claim against a union will undoubtedly have a substantial impact on the zeal with which unions police their own houses, press for the elimination of discriminatory provisions in contracts, and pressure employers to eradicate discrimination. As the Fifth Circuit noted in *Myers v. Gilman Paper Corp., supra:*

"Being jointly responsible for the creation and

---

[12] *E.g., Glus v. G.C. Murphy Co.,* 562 F.2d 880 (3d Cir. 1977) (finding no jurisdiction over contribution claim where employees had not named union in EEOC charge); *Younger v. Glamorgan Pipe & Foundry Co.,* 418 F. Supp. 743, 796-97 (W.D. Va. 1976), *vacated and remanded on other grounds,* 561 F.2d 563 (4th Cir. 1977); *Harden v. Illinois Bell Telephone Co.,* No. 74 C 1505 (N.D. Ill. 1975).

> maintenance of this system, [the unions] had an affirmative obligation to seek Title VII compliance. Had one of the unions, for example, forcefully brought Title VII's requirements to the company's attention and the other unions' attention, that might have provided the necessary stimulus for some or all of the other joint wrongdoers to end the violations." 544 F.2d at 851-52.

That observation has pointed relevance in this case where ALPA and TWU repeatedly pressed to preserve and enlarge the purser pay differential later held to be discriminatory.

B. Whether A Title VII Contribution Claim Is Barred If Not Asserted In The Original Proceeding Is A Question Of Great Importance To The Administration Of Federal Employment Discrimination Law.

The second aspect of the Title VII issue—whether an employer's contribution claim may be barred if it was not asserted early in the original Title VII action brought against the employer—is also worthy of consideration by this Court. The EEOC took the position as *amicus curiae* below that, while an employer does have a Title VII contribution claim, the claim must be asserted as soon as the employer is sued by the employees. The court of appeals remanded the case for general exploration of the "laches" issue, thereby implicitly accepting the proposition that there may be such a procedural bar to a Title VII contribution claim. The readiness of the EEOC to urge and the court below to accept such a quasi-legislative rule—found nowhere in Title VII or in the law of contribution as this Court has previously applied it, *see Cooper Stevedoring Co. v. Fritz Kopke, Inc., supra*—underscores the need for review by this Court.

A requirement of this sort is contrary to basic principles of the law of contribution and would lead to unjust results. The general rule is that a right to contribution does not arise until one of several wrongdoers has paid more than his fair share. Indeed, the traditional rule was that a contribution claim could not even be asserted until after the underlying action had terminated and the judgment had been paid. *See* W. Prosser, *Law of Torts* §50 at 309 & n.80 (4th ed. 1971); Restatement (Second), *Torts* §886A(2) (1979). Federal practice, of course, now permits early, even hypothetical assertion of contribution claims by way of impleader or cross-claim, but the Federal Rules do not require immediate assertion of the contingent claim. 3 J. Moore, *Federal Practice* ¶14.03[3] at 14-158, ¶14.06 (1979).

Thus, in light of the long-standing, uniform rule governing contribution, Northwest's commencement of this action—after its Title VII liability had been determined at the trial level but even before the decision on its appeal and before payment of the judgment—can hardly be found unreasonably tardy. Inexcusable delay, however, is an essential element of "laches." *Costello v. United States,* 365 U.S. 265, 282 (1961); *Bernard v. Gulf Oil Co.,* 596 F.2d 1249, 1256 (5th Cir. 1979).[13] As *amicus* below, the EEOC nevertheless suggested an ironclad rule requiring the employer to assert a contribution claim as soon as the employer is sued by the employee. It would be patently improper, however, for the courts to create a forfeiture of a contribution claim simply because the claim was not asserted as soon as the underlying charge of discrimination was levelled.

---

[13]Actual prejudice is the other element. *See Albemarle Paper Co. v. Moody, supra,* 422 U.S. at 424.

Any rule requiring immediate assertion of Title VII contribution claims would have important consequences for the administration and enforcement of Title VII. If employees bring their Title VII claims against the employer only, the employer would be forced, as a protective measure, to hale the union into court as well, even before any determination that a provision in the collective bargaining agreement violated Title VII. The compulsory addition of third-party defendants would make Title VII litigation needlessly more complex as a matter of course. Not only is the EEOC's proposed requirement unfounded in the structure of Title VII, it is also squarely at odds with Rule 14(a) of the Federal Rules of Civil Procedure, which provides that third-party claims are permissive, not mandatory.

The obvious importance of any special "laches" rule in Title VII cases argues strongly for intervention by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP A. LACOVARA
JAY KELLY WRIGHT
WILLIAM R. STEIN
Hughes Hubbard & Reed
Attorneys for Petitioner
Northwest Airlines, Inc.

January 1980.

APPENDIX A

Pertinent Statutory Provisions

Equal Pay Act:

29 U.S.C. §206(d)

(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any

amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Fair Labor Standards Act:

29 U.S.C. §211(a)

. . . Except as provided in section 212 of this title [pertaining to child labor], the Administrator shall bring all actions under section 217 of this title to restrain violations of this chapter.

29 U.S.C. §216

(a) Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation as the

case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection.

(c) The Secretary of Labor is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. When a written request is filed by any employee with the Secretary of Labor claiming unpaid minimum wages or unpaid overtime compensation under section 206 or 207 of

this title, the Secretary of Labor may bring an action in any court of competent jurisdiction to recover the amount of such claim: *Provided,* That this authority to sue shall not be used by the Secretary of Labor in any case involving an issue of law which has not been settled finally by the courts, and in any such case no court shall have jurisdiction over such action or proceeding initiated or brought by the Secretary of Labor if it does involve any issue of law not so finally settled. The consent of any employees to the bringing of any such action by the Secretary of Labor, unless such action is dismissed without prejudice on motion of the Secretary of Labor, shall constitute a waiver by such employee of any right of action he may have under subsection (b) of this section for such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

* * *

29 U.S.C. §217

The district courts . . . shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title.

Title VII, Civil Rights Act of 1964:

Section 701, 42 U.S.C. §2000e

For the purposes of this subchapter —

(a) The term "person" includes one or more individuals, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trust, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

* * *

Section 703, 42 U.S.C. §2000e-2

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to this compensation, terms, conditions, or privileges of employment, because of such

individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individiual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(c) It shall be an unlawful employment practice for a labor organization—

(a) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, seregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

* * *

Section 706, 42 U.S.C. §2000e-5

(a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this subchapter has

occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

* * *

(d) A charge under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practice occurred . . . .

(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period or reference under subsection (c) of this section (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary com-

pliance are warranted), the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved . . . .

(f) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter . . . .

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liablity shall not accrue from a date more than two years prior to the filing of a charge with the Commission . . . .

* * *

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AIRLINES, INC.,	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No. 75-0223
	)	
TRANSPORT WORKERS UNION	)	
OF AMERICA,	)	
AFL-CIO and AIR LINE PILOTS	)	
ASSOCIATION, INTERNATIONAL,	)	
	)	
Defendants.	)	

MEMORANDUM

By this action, plaintiff Northwest Airlines, Inc. ("Northwest") seeks a declaratory judgment that it is entitled to reimbursement from defendant unions, Transport Workers Union of America, AFL-CIO ("TWU"), and Air Line Pilots Association, International ("ALPA"), for some portion of the monetary judgment issued against it in *Laffey v. Northwest Airlines, Inc.*[1] In *Laffey,* Northwest was found

[1] 366 F. Supp. 763 (D.D.C. 1973), *affirmed,* ____ F.2d ____ , 13 F.E.P. Cases 1068 (D. C. Cir. 1976).

to have violated the Equal Pay Act[2] and Title VII of the Civil Rights Act of 1964,[3] by, *inter alia,* maintaining unwarranted salary differentials between male flight attendants or pursers, and the plaintiffs, two classes of female flight attendants,[4] and was held liable for back pay under Title VII and under the Equal Pay Act. These salary provisions were contained in collective bargaining agreements entered into by Northwest and the unions representing the flight attendants, which during the period involved in *Laffey* were defendants TWU and ALPA.[5]

Northwest sought, belatedly, to assert the claims involved in the instant action in the *Laffey* litigation by filing post-judgment motions for leave to serve a third-party complaint on TWU and to amend its answer to assert claims against ALPA, which had participated in the *Laffey* litigation as a "non-aligned party." When these motions were denied, Northwest brought the present action. Northwest's theory here is that because of defendants' participation in the collective bargaining agreement underlying the *Laffey* judgment, it is entitled to reimbursement for some portion of the monetary judgment issued against it in *Laffey* from defendants. With respect to its monetary liability arising under the Equal Pay Act, Northwest claims it is entitled to reimbursement on the ground that it has an implied cause of

---

[2]29 U.S.C. §206(d)(1) (1970).

[3]42 U.S.C. §2000e-2(a) (1970) (hereinafter "Title VII").

[4]One class was composed of female cabin attendants under the Equal Pay Act, and the second class was composed of female cabin attendants under Title VII. These classes were neither coextensive nor mutually inclusive.

[5]TWU was replaced as collective bargaining representative of Northwest's cabin attendants and pursers in September, 1971 by ALPA.

action against defendant unions under the Act for causing it to discriminate or, alternatively, on a theory of a right to contribution under the federal common law. With respect to its monetary liability arising under Title VII, Northwest bases its claim for reimbursement solely on the federal common law right to contribution.

This action is presently before the Court on defendants' motion to dismiss for failure to state a claim and for lack of subject matter jurisdiction.[6] Defendants contend that neither the Equal Pay Act nor Title VII afford Northwest an express or implied right to contribution for the monetary liability imposed on Northwest under these Acts and that Northwest has no federal common law right to contribution here. Defendants further contend that this Court lacks jurisdiction over certain of plaintiff's claims and that certain jurisdictional prerequisites to this action have not been met. For the reasons set forth below, the Court is of the opinion that it has jurisdiction over this matter, that Northwest's claim of entitlement to reimbursement for some portion of the monetary liability imposed under Title VII should not be dismissed and that Northwest's claim of entitlement to reimbursement for some portion of the monetary liability imposed under the Equal Pay Act must be dismissed.

THE EQUAL PAY ACT

The Equal Pay act prohibits employers from discriminating between employees on the basis of sex in the wages paid for equal work.[7] The Act also prohibits labor organi-

[6]By order dated November 11, 1975, this Court denied a prior motion to dismiss or stay this action, based on grounds not presented here, brought by defendant ALPA.

[7]29 U.S.C. §206(d)(1).

zations from causing or attempting to cause employers to discriminate against employees in violation of the Act.[8] Section 216 of Title 29 of the United States Code provides for civil enforcement of the Act. Section 216(b) expressly provides for a private right of action for aggrieved employees against employers,[9] and section 216(c) authorizes civil suits by the Secretary of Labor. There is no express provision for suits by either employees or employers against labor organizations for violations of the Act.[10]

As noted, one ground for Northwest's claim of entitlement to reimbursement for a portion of its monetary liability under the Equal Pay Act is that it has an implied cause of action under the Act against labor organizations which cause it to discriminate against employees in violation of the Act. In the few cases in which the question of whether there is such an implied cause of action under the Act has been addressed, the courts have uniformly held that there is no such implied cause of action. See, *Usery v. Beloit College,* 12 E.P.D. ¶11,203 (W.D. Wisc. 1976); *Brennan v. Emerald Renovators, Inc.,* 410 F. Supp. 1057 (S.D.N.Y. 1975); *Wirtz v. Hayes Industries, Inc.,* 9 F.E.P. Cases 493 (N.D.

---

[8]29 U.S.C. §206(d)(2).

[9]Section 216(b) provides in pertinent part that:

> (b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

[10]The only person expressly authorized to sue a labor organization is the Secretary of Labor, pursuant to 29 U.S.C. §216(c).

Ohio 1968). This Court must agree with the conclusions of the above courts.

To determine whether a statute affords a plaintiff an implied cause of action, the Court must consider four factors: 1) whether the plaintiff is a member of the class for whose special benefit the statute was enacted; 2) whether there is any indication of Congressional intent to create or deny such a cause of action; 3) whether an implied right is consistent with the statutory scheme and 4) whether the implied right is one traditionally relegated to state law. *Piper v. Chris-Craft Industries, Inc.*, 97 S. Ct. 926, 947-49 (1977); *Cort v. Ash*, 422 U.S. 66, 78 (1975). Neither the first nor the third factor is present here.

The Equal Pay Act was clearly designed to protect and benefit employees, and not for the special benefit of employers. Employers are the class whose conduct is regulated by the Act to protect employees. In light of the Supreme Court's decision in *Piper v. Chris-Craft Industries, Inc., supra*,[11] this Court is most hesitant to imply a cause of action for Northwest, a member of the class regulated by the Act to protect another class of persons. That the Act prohibits labor organizations from causing or attempting to cause employers to discriminate in violation of the Act does not, as plaintiff suggests, mean that the Act was designed for the especial benefit of employers or alter the status of employers as regulated parties under the Act.

Further, one of the policies underlying the Fair Labor Standards Act, of which the Equal Pay Act is a part, is that:

---

[11]In *Piper*, the Court declined to imply a cause of action under the Williams Act in favor of the plaintiff in part because the plaintiff was a member of the class whose conduct was regulated by the Act to protect another class of persons. *Id.* at 947.

> (a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . . (3) constitutes an unfair method of competition in commerce; . . . .[12]

By forcing employers to disgorge back pay discriminatorily withheld from employees, the Act prevents the employer who violates the Act from obtaining an unfair competitive advantage, in terms of salary costs, over employers who abide by the Act. To allow the employer to recover, by virtue of an implied cause of action under the Act, a portion of this back pay from a labor organization would place the discriminating employer in an unfairly advantageous position vis-a-vis employers who comply with the Act, thereby defeating this purpose. *See Brennan v. Emerald Renovators, Inc., supra,* at 1061.

Northwest also claims that it is entitled to contribution from defendants for its monetary liability under the Equal Pay Act under the federal common law right to contribution. Assuming at this point that federal law recognizes such a right,[13] Northwest would not be entitled to any contribution from defendants for its monetary liability under the Equal Pay Act. As Northwest recognizes, an essential prerequisite to any right to contribution, where such a right is recognized, is common liability; that is, both wrongdoers must be liable in common to the plaintiff. With respect to any right to contribution for its monetary liability under the Equal Pay Act, this requires that defendant unions, as well as North-

---

[12]29 U.S.C. §202(a)(3).

[13]This question is discussed more fully at pages 10-11 *infra*.

west, must be potentially liable for back pay under the Act to the *Laffey* plaintiffs.

The Equal Pay Act does not, as previously noted, expressly afford aggrieved employees, such as the *Laffey* plaintiffs, any right of action against a labor organization. Northwest urges, however, that aggrieved employees have an implied cause of action under the Act against labor organizations for violations of the Act. This question is governed by the standards enunciated in *Piper v. Chris-Craft Industries, Inc., supra,* and *Cort v. Ash, supra,* set forth above, and the courts which have considered the question have held that an employee does not have such an implied cause of action. *E.g., Cook v. Mountain States T & T Co.,* 12 F.E.P. Cases 979 (D. Ariz. 1975); *Tuma v. American Can Company,* 367 F. Supp. 1178 (D.N.J. 1973).[14] These decisions appear to be correct. While employees are the class of persons for whose benefit the Act was designed, the statutory provisions for civil enforcement and the legislative history suggest that Congress did not intend to create such a right and inferring such a right may well conflict with the purposes of the Act as discussed *supra.*[15] Consequently, since the Act does not expressly or impliedly afford employees, such as the *Laffey* plaintiffs, any right of action against defendant unions, the common liability prerequisite to a right of contribution is not present here.

---

[14]In *Hodgson v. Sanger, Inc.,* 326 F. Supp. 371 (D. Md. 1971), *affirmed sub nom., Hodgson v. Baltimore Regional Joint Board,* 462 F.2d 180 (9th Cir. 1972), the court held that the Secretary of Labor could recover back pay wages for employees from a labor organization. Contrary to plaintiff's contention, this does not mean that employees can bring an action against a labor organization or that labor organizations are directly liable to employees under the Act.

[15]See pages 14-15 *supra.*

TITLE VII

Title VII, like the Equal Pay Act, is silent on the question of contribution,[16] and Northwest does not here claim that Title VII expressly or implicitly affords it a right to reimbursement from or a cause of action against TWU and ALPA. Instead, Northwest bases its claim of entitlement to reimbursement for some portion of the monetary judgment awarded under Title VII from defendants solely on its alleged right to contribution under the federal common law.

A. *Jurisdiction.*

At the outset, defendants contend that this Court lacks jurisdiction over this claim for contribution. First, they assert that it is now axiomatic that federal courts do not have general common law jurisdiction. However, Northwest is not asserting here a common law right to contribution based on state law, but rather that it has a federal common law right to contribution. This presents a question of federal law[17] over which this Court has federal question jurisdiction pursuant to 28 U.S.C. §1331[18]

Defendants' second jurisdictional argument is premised upon the requirement of 42 U.S.C. §2000e-5(e) that the person aggrieved by violations of Title VII file a timely

---

[16]This question, as well as the question of whether Northwest is entitled to reimbursement for some portion of the monetary liability imposed under the Equal Pay Act, is governed by federal, not state, law. *See generally Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176 (1942).

[17]See note 16 *supra.*

[18]Even if this Court lacked federal question jurisdiction here, the uncontested allegations in the complaint reveal that the Court has diversity jurisdiction, pursuant to 28 U.S.C. §1332, and plaintiff has alleged such jurisdiction in its complaint.

charge with the Equal Employment Opportunity Commission ("EEOC"). It is now well-established that the filing of a charge with the EEOC is a jurisdictional prerequisite to the bringing of an action under Title VII for violations thereof.[19] Neither the *Laffey* plaintiffs nor Northwest has ever filed an EEOC charge against either ALPA or TWU. Consequently, defendants contend that this Court lacks jurisdiction over Northwest's claims against them.

This contention is not persuasive. Section 2000e-5(e) does not by its own terms apply to this action. A prior EEOC charge is a jurisdictional prerequisite only to an action brought under Title VII. Northwest does not bring this action under Title VII, but rather bases its claim and brings this action under the federal common law. There is no such prerequisite to a federal common law claim. Accordingly, several courts have determined, at least implicitly, that the charging requirement of section 2000e-5(e) is inapplicable to claims for contribution under federal common law theories. See *Grogg v. General Motors Corp.*, 72 F.R.D. 523 (S.D.N.Y. 1976); *Gilbert v. General Electric Company*, 59 F.R.D. 267 (E.D. Va. 1973); *Blanton v. Southern Bell Telephone & Telegraph Co.*, 49 F.R.D. 162 (N.D. Ga. 1970); *see also Osborne v. McCall Printing Co.*, 4 F.E.P. Cases 276 (S.D. Ohio 1972).

Defendants stress what they allege to be the inequity of a determination that the requirement of a prior EEOC charge is not applicable here. They point out that if they had been named as codefendants in *Laffey* without a prior EEOC

---

[19] *E.g., Williams v. General Foods Corp.*, 492 F.2d 399, 404-05 (7th Cir. 1974); *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 985 (D.C. Cir. 1973); *Stebbins v. Continental Insurance Companies*, 422 F.2d 843, 845 (D.C. Cir. 1971).

charge, they would have been entitled to dismissal and that if Northwest is not required to file a prior EEOC charge, its access to the courts will be faster and easier than that of the victims of discrimination. However, these differences are not due, as defendants suggest, to the status of the plaintiff, but to the nature of the cause of action involved. Simply put, the charging requirement applies by its own terms only to an action brought under Title VII, not to a claim based on the federal common law. Similarly, defendants point out that there has never been any determination that they violated Title VII, so that this would have to be established in this action. Since the victim of discrimination cannot establish a violation of Title VII absent a prior EEOC charge, defendants argue that an employer should not be able to do so. Once again, this difference is due to the nature of the cause of action, not the status of the parties.

B. *The Right to Contribution.*

There are two principle elements of a right to contribution. There must be common liability,[20] and the party seeking contribution must have paid more than its share of the monetary award.[21] As to common liability, this requirement is met here. It is now fairly well-established that a labor organization is liable to employees or prospective employees for discriminatory provisions in collective bargaining agreements to which they were a party. *See, e.g., Myers v. Gilman Paper Corp.,* 544 F.2d 837 (5th Cir. 1977); *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976).[22] Several cases have held that employers and unions

---

[20]See page 6 *supra.*

[21]See Prosser, *Law of Torts,* §47 (1964 ed.).

[22]In *Laffey v. Northwest Airlines, Inc., supra,* this Circuit stated in dictum that an employee has a cause of action against a union if the union contributed to the discriminatory scheme. 13 F.E.P. Cases, *supra* at 1080.

are jointly and severally liable for back pay awarded under Title VII. *E.g., Evans v. Sheraton Park Hotel,* 503 F.2d 177 (D.C. Cir. 1974). Whether the second criteria is met, that Northwest has paid more than its share of the monetary judgment, is largely a factual question not at issue here.[23]

The more difficult question is whether there is a right to contribution under federal law. The traditional American rule, originating in the English case of *Merryweather v. Nixon,*[24] was that there was no right to contribution between joint tortfeasors. This rule has been abrogated in most states, principally by statute although a few jurisdictions, including the District of Columbia,[25] have done so by decisional law. As with state law, there was initially no right to contribution under federal law, absent legislation. *Union Stock Yards Co. v. Chicago, B & Q R. Co.,* 196 U.S. 217, 224 (1905). However, the modern trend, as evidenced by cases such as *Kohr v. Allegheny Airlines, Inc.,* 504 F.2d 400 (7th Cir. 1974), *cert. denied,* 421 U.S. 975 (1975), has been to recognize a right to contribution under federal law. *Gould v. American-Hawaiian Steamship Company,* 387 F. Supp. 163, 169 (D. Del. 1974), *vacated on other grounds,* 535 F.2d 761 (3rd Cir. 1976). The federal courts have come to realize that the policy considerations upon which the

---

[23]Judge Robinson has estimated that the amount of the monetary judgment which will be entered against Northwest in *Laffey* will be $24,500,000. *Laffey v. Northwest Airlines, Inc.,* 374 F. Supp. 1382 (D.D.C. 1974). While Northwest has been required to post a supersedeas bond in this amount, it does not appear that the judgment has yet been paid. Further, there has not yet been any determination that ALPA or TWU violated Title VII, which determination, among others, will have to be made before the Court can decide whether or not Northwest paid more than its fair share.

[24]1799,8 Term.Rep. 186, 101 Eng. Rep. 1337.

[25]*Knell v. Feltman,* 174 F.2d 662 (D.C. Cir. 1949).

traditional rule was built are archaic and lead to inequities.[26] Indeed, the most extensive body of law evidencing a significant trend toward fashioning a federal common law right to contribution concerns contribution for back pay awarded under Title VII.

Although there are no cases directly on all fours with the present case,[27] the great majority of cases which have considered the question of a federal common law right to contribution for back pay imposed under Title VII favor Northwest's position. There is now persuasive and ample authority for the proposition that there is a federal common law right to contribution for back pay awarded under Title VII. *See Grogg v. General Motors Corp.*, 72 F.R.D. 523 (S.D.N.Y. 1976); *Lynch v. Sperry Rand Corp.*, 62 F.R.D. 78 (S.D.N.Y. 1973); *Gilbert v. General Electric Company*, 59 F.R.D. 267 (E.D. Va. 1973); *Osborne v. McCall Printing Co.*, 4 F.E.P. Cases 276 (S.D. Ohio 1972); *Blanton v. Southern Bell Telephone & Telegraph Co.*, 49 F.R.D. 162 (N.D. Ga. 1970); *Bowe v. Colgate-Palmolive Company*, 272 F. Supp. 332 (S.D. Ind. 1967), *reversed in part on other grounds*, 416 F.2d 711 (7th Cir. 1969); *see also Myers v. Gilman Paper Corp.*, 544 F.2d 837, 860 (5th Cir. 1977); *Electrical Workers (IUE) v. Westinghouse Broadcasting Co., Inc.*, 12 E.P.D. ¶11,273 (W.D.N.Y. 1976).

---

[26] *E.g., Kohr v. Allegheny Airlines, Inc., supra*, at 405.

[27] In most of these cases, this question arose in the context of a motion by a union to dismiss a cross-claim or counterclaim for contribution asserted by an employer against a union in an action brought by employees under Title VII. Here, Northwest has brought a separate action for a declaratory judgment as to its right to contribution. These differences are not material, and do not go to the merits of plaintiff's claim for contribution.

The Court is aware of only two cases which have denied claims for contribution for a monetary judgment imposed under Title VII, neither of which is particularly apposite or persuasive. In *Harden v. Illinois Bell Tel. Co.*, No. 74C1505 (N.D. Ill. 1975), the court held that there was no implied cause of action for contribution, slip op. at 2-3, but did not consider the question of whether there is a federal common law right to contribution. In *Younger v. Glamorgan Paper & Foundry Company,* 418 F. Supp. 743 (W.D. Va. 1976), the court held that there was no federal common law right to contribution because, since *Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1937), there is no federal common law. *Id.* at 797. The reasoning of the court is somewhat suspect in light of the cases finding not only the existence of a federal common law, but also of a federal common law right to contribution.

Despite this body of authority supporting a right to contribution here, defendants argue that the Court cannot and should not find a common law right to contribution here because the monetary liability arose from a federal statute which is silent on the right to contribution. For this proposition they rely primarily on *Halcyon Lines, Inc. v. Haenn Ship Corp.*, 342 U.S. 282 (1952), and several cases involving the federal antitrust laws.[28] These cases do not

[28]Defendant unions also refer to cases pertaining to liability under the Federal Motor Vehicle Information and Cost Savings Act, 15 U.S.C. §§1901-91, and to cases such as *Carriers Insurance Exchange v. Truck Insurance Exchange,* 310 F.2d 653 (4th Cir. 1962), where it was held that there is no right to contribution among joint tortfeasors who intentionally violate the safety rules of the Interstate Commerce Commission. These cases are inapposite. As discussed later herein, that contribution does not lie for intentional wrongdoers does not mean that a right to contribution does not lie under any circumstances. Similarly the motor vehicles statute is materially different from Title VII in that, as noted in *Mataya v. Behm Motors, Inc.*, 409 F. Supp. 65 (E.D. Wisc. 1976), liability under this Act is separate and individual.

compel this conclusion. In *Halcyon,* the Court declined to fashion new judicial rules of contribution because of the complex legislation involved there,[29] which legislation was materially different from that involved here. While defendants cite several cases which they claim held that there is no federal right to contribution for damages awarded under the antitrust laws, only one case, *Sabre Shipping Corporation v. American President Lines,* 298 F. Supp. 1339 (S.D.N.Y. 1969), so held.[30] This one case pertaining to the antitrust statutes is certainly not dispositive of the issues here and, in contrast to this decision, stand the numerous cases mentioned above pertaining to Title VII and the cases finding a federal common law right to contribution for damages awarded under the federal securities acts, where the statutory right to contribution did not apply, *e.g., Gould v. American-Hawaiian Steamship Co., supra.*

While these cases do not compel the conclusion that the fact that the monetary liability for which contribution is sought arose under a federal statute which is silent on contribution necessarily precludes a federal common law right to contribution here, this fact is not of no consequence. Where, as here, the monetary liability arose under such a statute, the Court should consider whether the Con-

---

[29]*Id.* at 285-87.

[30]In *Baughman v. Cooper-Jarrett, Inc.,* 391 F. Supp. 671 (W.D. Pa. 1975), *rev'd on other grounds,* 530 F.2d 529 (3rd Cir. 1976), another case relied on by defendants, the court only stated in *dicta* that under federal law there is no right to contribution for *intentional* torts. *Id.* at 678 n.3. As noted, many courts deny contribution for intentional acts, and this limitation on the right to contribution does not mean that contribution does not lie under any circumstances. In *Goldlawr, Incoporated v. Shubert,* 276 F.2d 614 (3rd Cir. 1960), the court only stated, again in *dicta,* that there was strong justification for the claim that there is no right to contribution under federal law. *Id.* at 616.

gressional silence evidences a desire to deny a right of contribution and whether such a right would be consistent with the statutory framework or whether there are any other factors which counsel leaving the question of contribution to Congress. The Court has been unable to discern any indication from Title VII or its history that Congress was silent on contribution in Title VII because it meant to deny such a right. Further, a right to contribution, as discussed below, will serve to insure that the provisions of Title VII are fully enforced and is consistent with the statutory framework and the statute's underlying policies. It is also to be noted that back pay under Title VII is viewed as an equitable remedy[31] and that the court's power to award contribution initially arose from its equity jurisdiction.[32] Finally, factors such as those present in *Halcyon Lines v. Haenn Ship Corp., supra,* which counsel in favor of leaving the question of contribution to Congress are not present here.

In addition to the case law supporting Northwest's position, there are strong policy considerations favoring a rule allowing contribution. There has been much criticism of and, as this Circuit has noted, revulsion against the no contribution rule because of the inequities which result and the faulty reasoning underlying it.[33] The no contribution rule leads to an inequitable distribution of justice in that the plaintiff, through caprice or intent, can force one of two wrongdoers to bear the entire loss while the other may be

---

[31]*Evans v. Sheraton Park Hotel, supra* at 186.

[32]*See, e.g., Huggins v. Graves,* 210 F. Supp. 98, 105 (E.D. Tenn. 1962), *affirmed,* 337 F.2d 486 (6th Cir. 1964); *Theobald v. Angelos,* 44 N.J. 228, 208 A.2d 129, 134 (1965); *Hobbs v. Hurling,* 117 Md. 449, 104 A. 815 (1918).

[33]*Knell v. Feltman, supra* at 666.

more or equally to blame. A rule allowing contribution would lead to a more equitable distribution of justice in that each wrongdoer would be forced to pay its fair share.[34] If, as Northwest claims, defendants caused it to discriminate, under a no contribution rule, the entire burden of a judgment of potentially $24,400,000 will fall on Northwest, while the unions will get off "scot free." Allowing contribution here will force each party to bear its fair share, and only its fair share, of the loss they have caused the *Laffey* plaintiffs. It has also been noted that the no contribution rule can lead to collusion between a plaintiff and one against whom he has a cause of action to impose the liability on another.[35]

The deterrent effects of the rules for and against contribution cannot be overlooked, particularly in light of the important national policies underlying Title VII which should not be subverted. The traditional wisdom has been that a no contribution rule will deter potential wrongdoers because they will know that they can be forced to bear the entire loss. This reasoning has been much criticized,[36] and overlooks the fact the potential wrongdoer will also know that he may well avoid any responsibility for the loss, depending upon whom the plaintiff chooses to sue. A rule allowing contribution will better serve the interests protected by Title VII and deter violations thereof. Potential violators will know that they will have to bear their share of the loss they cause an employee or prospective employee to suffer, and that their responsibility for such loss cannot be avoided simply by the plantiff's choice of a defendant. Both union and

---

[34]See *Cooper Stevedoring Co., Inc. v. Kopke, Inc.*, 417 U.S. 106, 111 (1974), *Knell v. Feltman, supra* at 665.

[35]*Knell v. Feltman, supra* at 665.

[36]See *Knell v. Feltman, supra* at 666; Prosser, *supra* note 21.

employer will know that they both must be vigilant to eschew unlawful discrimination and that the employee's predelictions as to whom to sue will not insure either immunity from the mandates of the law.

It is noted that a federal right to contribution for back pay awarded under Title VII, but not for monetary liability imposed under the Equal Pay Act is somewhat inconsistent in that the provisions of these statutes overlap in certain areas. This is due, however, to the statutes involved and not to the federal common law right to contribution. As noted, an essential prerequisite to contribution, where a right to contribution is recognized, is common liability. Since labor organizations and employers do not share common liability to employees under the Equal Pay Act, there can be no contribution, which is not true with Title VII. Further, to hold, as defendants urge, that because there is no right to contribution for monetary liability under the Equal Pay Act there can be none for Title VII liability, would, in effect, allow "the tail to wag the dog." While the Equal Pay Act governs only discrimination on the basis of sex in the payment of wages, Title VII pertains to many other types of discrimination in many other areas. The availability of contribution for monetary liability under the more comprehensive statute should not be governed by the availability of contribution under the more narrow statute.

Finally, defendants contend that even if there is a right to contribution, it does not apply here. They rely on the rule adopted in many jurisdictions denying contribution for intentional acts, and contend that Northwest's violations of Title VII were intentional so that it has no right to contribution here.[37] Northwest vigorously disputes de-

---

[37]To support their claim that Northwest's violations were intentional, ALPA and TWU stress certain statements by this Circuit in *Laffey v. Northwest Airlines, Inc., supra.*

fendants' definition of intentional acts. The Court will not reach this question at this point. To determine whether Northwest's violations were intentional, assuming that this would bar contribution, would require this Court to look beyond the pleadings in this case which, since this case is before the Court on a motion to dismiss for failure to state a claim,[38] would not be proper. At this time, the Court holds only that there is a federal common law right to contribution for monetary liability imposed under Title VII, at least under some circumstances, and it will reach the questions as to the precise parameters of this right when the pertinent facts have been developed and properly placed before the Court.

/s/ Oliver Gasch

Judge

Date: July 7, 1977

[38]This action is also before this Court on a motion to dismiss for lack of subject matter jurisdiction, but this question does not arise in the context of that part of the motion.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AIRLINES, INC.,	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No. 75-0223
	)	
TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,	)	
	)	
Defendants.	)	

ORDER

Upon consideration of defendants' motion to dismiss this action, plaintiff's opposition thereto, and the memoranda of points and authorities submitted by the parties, and having heard counsel for the parties at oral argument, and for the reasons set forth in the Memorandum attached hereto, it is by the Court this 7th day of July, 1977,

ORDERED that plaintiff's claim for reimbursement for some portion of its monetary liability arising under the Equal

Pay Act be, and hereby is, dismissed; and it is further

ORDERED that defendants' motion to dismiss be, and hereby is, denied in all other respects.

/s/ Oliver Gasch

Judge

APPENDIX D

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1056

NORTHWEST AIRLINES, INC.

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO, APPELLANT

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

No. 78-1098

NORTHWEST AIRLINES, INC.

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, APPELLANT

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 78-1141

NORTHWEST AIRLINES, INC., APPELLANT

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO AND AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

Appeals from the United States District Court for the District of Columbia

(D.C. Civil Action No. 75-0223)

Argued January 24, 1979

Decided August 30, 1979

Stephen B. Moldof with whom *Robert S. Savelson* and *Donald J. Capuano* were on the brief, for appellant/cross-appellee, Air Line Pilots Association, International.

Asher Schwartz, for appellant/cross-appellee, Transport Workers Union of America.

Henry Halladay with whom *David A. Ranheim, Robert Bayer* and *Philip A. Lacovara* were on the brief, for appellee/cross-appellant, Northwest Airlines, Inc.

Vella M. Fink, Attorney, Equal Employment Opportunity Commission, with whom *Charles L. Reischel*, Assistant General Counsel, Equal Employment Opportunity Commission, was on the brief for Amicus Curiae urging dismissal.

Also *William R. Hayden* entered an appearance for Air Line Pilots Association, International in No. 78-1056.

Before WRIGHT, *Chief Judge*, and ROBINSON, *Circuit Judge*, and RICHEY,* *District Judge*.

Opinion for the Court filed by *Judge* RICHEY.

RICHEY, *District Judge*: In this case, we are called upon to determine whether an employer who violates both the Equal Pay Act of 1963 and title VII of the Civil Rights Act of 1964 possesses, under either law, a right of contribution from a union which allegedly participated in the wrong. We affirm the district court's ruling that no such right exists under the Equal Pay Act, but with respect to the title VII issue, we remand for further proceedings necessary to determine the suitability of the plaintiff's claim. Before reviewing the issues raised by this appeal, we briefly examine the background of this litigation.

I. BACKGROUND

The origin of Northwest Airlines' (the Airlines) suit against the Air Line Pilots Association, International (ALPA) and the Transport Workers Union of America (TWU) lies in a previous action instituted by Mary P. Laffey. Ms. Laffey, representing a class comprising all Northwest Airlines female cabin attendants, successfully sued her employer, the Airlines, on the grounds that it had violated both the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), and title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). *Laffey v. Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C. 1973) and 374 F. Supp. 1082 (D.D.C. 1974), *aff'd in part and vacated in part*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434

---

* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

U.S. 1086 (1978). After the entry of the district court's judgment in favor of Ms. Laffey's class, the Airlines moved to amend its answer to assert a crossclaim for contribution or indemnification from the ALPA. Although the ALPA had appeared in the *Laffey* trial as a non-aligned party, it never actively participated in the proceedings. The Airlines also moved to assert a third-party complaint against the TWU, the original certified bargaining representative of the plaintiff class until the ALPA assumed representation in the middle of the suit. The Airlines' motions, both filed almost one and a half years after the completion of the *Laffey* trial, were denied by the district court. This Court affirmed that ruling as within the sound discretion of the trial court. 567 F.2d at 476-78.

After the district court denied the two motions, the Airlines filed a separate suit against the TWU and the ALPA. It sought "a declaration and adjudication that TWU and ALPA are also liable, in turn and respectively, by virtue of their participation in the negotiation, execution and implementation of the collective bargaining contracts which provided for discrimination. . . ." Complaint ¶ 11, C.A. No. 75-0223 (D.D.C. filed Feb. 18, 1975). Specifically, the Airlines sought a declaratory judgment holding the unions liable for the violations of the Equal Pay Act and title VII originating in the collective bargaining agreements which they had helped negotiate. In due course, the unions moved to dismiss the Airlines' complaint for failure to state a claim and for lack of subject matter jurisdiction.

Ruling on this motion, the district court declared invalid the Airlines' claim under the Equal Pay Act, but upheld the claim under title VII. With respect to the Equal Pay Act claim, the court followed a line of precedent refusing to imply a cause of action for contribution or indemnification; the district court held that the cause

of action sought by the Airlines was inconsistent with the intended purpose of the law. Yet, the court found that the implication of a cause of action for contribution was consistent with the underlying purpose of title VII. It also held that subject matter jurisdiction for such a claim existed under 28 U.S.C. § 1331, because the Airlines was asserting a federal common law right. Relying on this conclusion, the court noted that the Airlines' lack of compliance with section 2000e-5(e) of title 42, U.S. Code, was not a bar. This provision requires an aggrieved party to file a complaint with the Equal Employment Opportunity Commission (EEOC) before commencing suit in the federal courts. In sum, the district court found that the Airlines was bringing a suit, not under title VII, but under federal common law. The court, however, qualified its conclusions regarding the plaintiff's right of contribution:

> At this time, the Court holds only that there is a federal common law right to contribution for monetary liability imposed under title VII, at least under some circumstances, and it will reach the question as to the precise parameters of this right when the pertinent facts have been developed and properly placed before the Court.

Memorandum Opinion, slip op. at 17, C.A. No. 75-0223 (D.D.C. July 7, 1977).

The district court later amended its order to include a certification for interlocutory appeal under 28 U.S.C. § 1292(b). By order of January 6, 1978, this Court granted the parties' petitions for leave to appeal. Shortly thereafter, the district court, under Fed. R. Civ. P. 54(b), entered a final judgment dismissing the Airlines' claim for reimbursement under the Equal Pay Act. Order, C.A. No. 75-0223 (D.D.C. Jan. 11, 1978).

We are thus presented with the question of Northwest Airlines' right to contribution under 29 U.S.C. § 206 (d) (1) and 42 U.S.C. § 2000e-2(a).

II. The Airlines Has No Right To Contribution Under the Equal Pay Act

We affirm the district court's conclusion regarding contribution under the Equal Pay Act, because we find such a right inconsistent with both the statute's language and purpose.

The Equal Pay Act ("the Act") proscribes discrimination in wages on the basis of sex where substantially similar work is performed. In the statute's express terms, no right of contribution is mentioned, nor is there any provision for monetary liability on the part of unions, for the benefit of employees. Yet, the Act's bar extends, in two distinct statutory subsections, to both employers and unions alike:

> (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . .
>
> (2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

29 U.S.C. §§ 206(d)(1) & (2) (1976). The Act provides for suits by aggrieved employees, but, by its express terms, it only allows such suits against employers:

> *Any employer* who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained against *any employer* (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. . . .

29 U.S.C. § 216(b) (1976) (emphasis added). *See Tuma v. American Can Co.*, 367 F. Supp. 1178, 1181-82 (D.N.J. 1973). Unions, however, are not insulated from all redress under the Act. Section 216(c) of title 29, U.S. Code, empowers the Secretary of Labor "to supervise the payment of . . . wages . . . owing to any employee or employees under section 206 or section 209 of this title." This power certainly includes the authority to seek redress against unions which violate the Act.[1] *E.g., Hodgson v. Sagner, Inc.*, 326 F. Supp. 371 (D. Md. 1971), *aff'd per curiam sub nom. Hodgson v. Baltimore Regional Joint Board*, 462 F.2d 180 (4th Cir. 1972). The relevant statutes thus do not expressly create either a cause of action against unions for the benefit of employees, or one for contribution for the benefit of employers. Accordingly, we must determine whether, under the circumstances of

---

[1] Pursuant to Reorganization Plan No. 1 of 1978, § 1, 43 Fed. Reg. 19807, *reprinted in* 5 U.S.C.A. app. II (1979 Supp.), the Secretary of Labor's enforcement powers over the Equal Pay Act were transferred to the Equal Employment Opportunity Commission.

this case, it would be appropriate to imply the cause of action which the Airlines has asserted.

In determining whether to imply a cause of action for contribution, we must seek guidance from the familiar test developed in *Cort v. Ash*, 422 U.S. 66 (175). Although the *Cort* standard is more commonly applied to assess the validity of implying a *plaintiff's* cause of action, it has full relevance to the present situation, involving a defendant turned third-party plaintiff. The *Cort* standard basically provides insight into the legislative intent behind the statute at issue and thereby offers guidance, regardless of the differing postures of the parties who may benefit from implication. The standard requires this Court to weigh four factors: 1) whether the plaintiff is one of the class for whose *especial* benefit the statute was enacted; 2) whether there is any indication of legislative intent to create or deny a remedy; 3) whether it is consistent with the legislative scheme to imply such a remedy; and (4) whether the cause of action is one traditionally relegated to state law so that it would be inappropriate to infer a federal cause of action. 422 U.S. at 78.

Although the district court also applied the *Cort* test, its analysis incorrectly focused upon whether the employer, Northwest Airlines, was a party for whose special benefit the Equal Pay Act was enacted. Those who seek contribution must have been, at one time, defendants and almost by definition, defendants are excluded from the class envisioned in the first prong of the *Cort* test. Thus, under the district court's analysis, any defendant who seeks to become a third-party plaintiff will almost always be denied an implied right of contribution. Significantly, apart from *Cort*, plaintiff's position—not that of the defendant or third-party plaintiff—vis-a-vis the third-party defendant will generally determine the existence of a right of contribution: if the plaintiff could hold either

of two defendants liable, a right of contribution will be recognized; if, on the other hand, one of the defendants is protected from suit by the plaintiff, it will also be protected from contribution. Prosser, *Handbook of the Law of Torts* § 50, at 309 (4th ed. 1971). Accordingly, in order to determine whether an employer may seek contribution from a union, we must also consider whether an employee could bring suit against a union. Here, this approach provides insight into the legislative scheme. In order to avoid the confusing results which flow from the district court's application of the *Cort* test, we find it more realistic, under *Cort*, to regard the employees as the benefitting class and to regard the union as being held liable to them. Under this approach, the first prong of the *Cort* test is easily satisfied. The employees are clearly the class especially intended to be protected under the Equal Pay Act.

The Airlines' claim, however, fails to satisfy the third prong of the *Cort* test—consistency with the legislative scheme. It is improbable that an employee would ever have an implied cause of action under the Equal Pay Act against his union. The statutory scheme envisions three modes of enforcement and to imply a fourth would be inconsistent with the intent evidenced by the existing three. First, under section 216(a) of title 29, U.S. Code, "any person" who wilfully violates the Act may be subject to criminal penalties. Under section 216(c), the Secretary of Labor may bring suit to recover money owing "to any employee or employees." [2] Finally, section 216(b) of title 29 permits suits by employees against "any employer" who violates the Act. The statutory scheme of enforcement is comprehensive and by omission, it insulates unions from suits by employees. This statutory protection would certainly be frustrated by a declaration that an *employer* could recover from a union,

[2] See note 1 *supra*.

once that employer had been found liable to its employees. Of course, we need not—and do not—definitely resolve the issue of an employee's right to sue a union under the Act. We hold only that the likelihood of the implication of such a right is sufficiently remote to preclude the creation of a cause of action against a union for contribution or indemnification. Such a cause of action would, in reality, create liability on the part of the union for the benefit of employees whom Congress did not intend to protect in such a manner.

The stated purpose of the Equal Pay Act is also instructive on the issue of implication. The Act's declaration of purpose states that "wage differentials based on sex . . . [constitute] an unfair method of competition." Equal Pay Act of 1963, Pub. L. No. 88-38, § 2(a)(5), 77 Stat. 56; *see* 29 U.S.C. § 202(a)(3) (1976). By declaring these differentials illegal, the Act attempts to regulate competition between various business concerns. Certainly, the parties most appropriately subject to this regulation would be employers, not unions. The Act's focus on unfair competition explains the existence of a greater battery of deterrents against employer-violators than against unions who participate in the breach. The Airlines submits that this analysis has no relevance in the present case because its conflict typified an industry-wide practice. As a result, the Airlines concludes, the business practices at issue could never be the source of an unfair competitive advantage. The air travel industry, however, is certainly in competition with other methods of transportation and the illegal wage differential may well have provided some advantage over firms offering other means of travel. Thus, this Court's decision not to imply a cause of action for contribution or indemnification against a union is fully consistent with the purpose and scope of the Equal Pay Act.

Our conclusion is also in accord with a persuasive and well-reasoned line of precedent. In *Denicola v. G.C. Murphy Co.*, 562 F.2d 889, 894 (3d Cir. 1977), the Third Circuit decided:

> As noted *supra*, the Equal Pay Act specifically provides for a cause of action against an employer for back wages. The act evidences absolutely no Congressional intent to make a union liable either to an employee or to an employer. We recognize the fact that an act need not specifically provide for a cause of action in order for it to provide the basis for recovery. *See, e.g., Cort v. Ash*, 422 U.S. 66, 75, 95 S. Ct. 2080, 45 L.Ed. 2d 26 (1975). However, we find none of the relevant criteria suggested in *Cort* present which would allow a cause to be implied under the Equal Pay Act against a union.

Reviewing the same contribution issue, *Brennan v. Emerald Renovators, Inc.*, 410 F. Supp. 1057 (S.D.N.Y. 1975), also concluded "[T]here seems no need to supplement the statute with an additional remedy which Congress did not see fit to provide." [3] Plaintiff's reliance on *Hodgson v. Sagner, Inc.*, 326 F. Supp. 371 (D. Md. 1971), *aff'd per curiam sub nom. Hodgson v. Baltimore Regional Joint Board*, 462 F.2d 180 (4th Cir. 1972), as being to the contrary is mistaken. In *Hodgson*, not only was the plaintiff the Secretary of Labor, but the Secretary himself had named both an employer and a union as defendants. Although the court held that the Secretary was entitled to recover money damages from the union, 326 F. Supp. at 373, it did not even address the issue of employer-union contribution. *Hodgson* thus is fully distinguishable from the present case and our ruling here is not the least bit inconsistent with that decision.

---

[3] *Accord*, Cook v. Mountain States Tel. & Tel. Co., 397 F. Supp. 1217, 1226 (D. Ariz. 1975); Tuma v. American Can Co., 367 F. Supp. 1178 (D. N.J. 1973); Wirtz v. Hayes Indus., Inc., 58 Lab. Cas (CCH) ¶ 32,085 (N.D. Ohio 1968).

Based on the foregoing, we conclude that an employer's right of contribution or indemnification against a union is inconsistent with the scheme and purpose of the Equal Pay Act. Accordingly, on this point, we affirm the district court's dismissal of Northwest Airlines' claim.

III. The Plaintiff's Title VII Claim is Remanded For a Determination on the Issue of Laches

Although the district court found that contribution was appropriate under title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), we decline to affirm that holding at this juncture. On appeal, the defendant unions have raised, for the first time, the argument that the Airlines' claim is barred by laches. Of course, we make no ruling regarding the merits of this contention. We only decline to resolve a complex and sensitive question when the claim which forms the basis of the appeal may suffer from some other defect. This approach is especially appropriate here, because the parties have relied on title VII's goal of prompt, administrative review in arguing for, or against, the existence of a right of contribution. For example, the unions contend that the acknowledgment of any right of contribution or indemnification would be inconsistent with this statutory goal. The Equal Employment Opportunity Commission, as amicus curiae, has argued that contribution is appropriate under title VII, but only if the defendant's claim is brought promptly in the original suit by the aggrieved employee. Thus, timeliness may well be an important consideration in evaluating the propriety of a cause of action for contribution;[4] conceivably, untimeliness, and

[4] We note that for a variety of reasons, timeliness is a less relevant consideration to the review of plaintiff's claim under the Equal Pay Act. First, that claim is before the court as a final judgment pursuant to Fed. R. Civ. P. 54(b), not an interlocutory appeal under 28 U.S.C. § 1292(b). More importantly, the absence of an administrative review process,

the injustice resulting therefrom, could interfere with the Court's assessment of the general validity of contribution under title VII. Hard cases may make bad law, but unnecessary hard cases should not make any law at all.

Accordingly, we remand that portion of the district court's order which grants the plaintiff a right of contribution or indemnification under title VII and instruct the trial court to make a determination on the laches question. If the trial court finds that laches is not a bar, the defendants' appeal may be renewed.

IV. Conclusion

Although we apply a slightly different analysis, we affirm the district court's holding that, under the Equal Pay Act, no right of contribution or indemnification exists in favor of the plaintiff, Northwest Airlines. With respect to the remainder of the district court's order, we remand for a determination on the laches question.

Judgment Accordingly.

---

designed to expedite the resolution of claims, renders the statutory scheme of the Equal Pay Act vitally different from that of title VII. Finally, we note that in their arguments concerning the Equal Pay Act claim, none of the parties has raised any issue with respect to laches.

APPENDIX E

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1056 **September Term, 1978**

Northwest Airlines, Inc. D.C. Civil No. 75-0223

v.

Transport Workers Union of America, AFL-CIO, United States Court of Appeals
Appellant for the District of Columbia Circuit

Air Line Pilots Association, International FILED AUG 30, 1979

No. 78-1098

Northwest Airlines, Inc. GEORGE A. FISHER
CLERK

v.

Transport Workers Union of America, AFL-CIO

Air Line Pilots Association, International,
Appellant

No. 78-1141

Northwest Airlines, Inc.,
Appellant

v.

Transport Workers Union of America, AFL-CIO and Air Line Pilots Association, International

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: WRIGHT, Chief Judge, and ROBINSON, Circuit Judge, and RICHEY,* District Judge

ORDER

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED, by this Court, that the judgment of the District Court appealed from in these causes is affirmed in part, in accordance with opinion of this Court filed herein this date, and it is

FURTHER ORDERED AND ADJUDGED, by this Court, with respect to that portion of the case which is not the subject of the foregoing affirmance, that the record is remanded to the District Court for further proceedings, also in accordance with the opinion of this Court filed herein this date.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

Date: August 30, 1979

Opinion for the Court filed by District Judge Richey.

*Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. §292(a).

APPENDIX F

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1056 **September Term, 1978**

Northwest Airlines, Inc.

v.

Transport Workers Union of America, AFL-CIO,

Appellant

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 5 1979

GEORGE A. FISHER
CLERK

And Consolidated Case Nos. 78-1098 and 78-1141

BEFORE: Wright, Chief Judge; Robinson, Circuit Judge; and Richey*, Judge, United States District Court for the District of Columbia

ORDER

IT IS ORDERED, by the Court, *sua sponte,* that the order entered in these consolidated appeals, on August 30, 1979, be, and it is hereby, vacated.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

*Sitting by designation pursuant to Title 28 U.S.C. §292(a).

APPENDIX G

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1056 **September Term, 1978**

Northwest Airlines, Inc. D.C. Civil No. 75-0223

v.

Transport Workers Union of America, AFL-CIO, United States Court of Appeals
Appellant for the District of Columbia Circuit

Air Line Pilots Association, International FILED OCT. 5, 1979

No. 78-1098

Northwest Airlines, Inc. GEORGE A. FISHER
CLERK

v.

Transport Workers Union of America, AFL-CIO

Air Line Pilots Association, International,
Appellant

No. 78-1141

Northwest Airlines, Inc.,
Appellant

v.

Transport Workers Union of America, AFL-CIO and Air Line Pilots Association, International

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: WRIGHT, Chief Judge, and ROBINSON, Circuit Judge, and RICHEY,* District Judge

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED, by this Court, that the judgment of the District Court appealed from in these causes, insofar as it pertains to the Equal Pay Act, is affirmed, but said judgment, to the extent that it relates to the Title VII claim, is vacated in order that the District Court may consider the issue of laches, and this case is remanded to the District Court for further proceedings, all in accordance with the opinion of this Court filed herein on August 30, 1979.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

Date: October 5, 1979

Opinion for the Court filed by District Judge Richey.

*Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. §292(a).

APPENDIX H

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1056 **September Term, 1978**

Northwest Airlines, Inc.

v.

Transport Workers Union of America, AFL-CIO,
Appellant

Air Line Pilots Association, International

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 9 1979

GEORGE A. FISHER
CLERK

And Consolidated Case Nos. 78-1098 and 78-1141

BEFORE: Wright, Chief Judge; Robinson, Circuit Judge; and Richey*, Judge, United States District Court for the District of Columbia

ORDER

Upon consideration of appellee's (Northwest Airlines, Inc.) petition for rehearing, it is

ORDERED, by the Court, that appellee's aforesaid petition for rehearing is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

*Sitting by designation pursuant to Title 28 U.S.C. §292(a).

Supreme Court, U. S.
FILED
AUG 29 1980

No. 79-1056

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

AND

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

PHILIP A. LACOVARA
Hughes Hubbard & Reed
1660 L Street, N.W.
Washington, D.C. 20036
(202) 862-7400

Attorneys for Petitioner Northwest Airlines, Inc.

ASHER SCHWARTZ
O'Donnell & Schwartz
285 Madison Avenue
New York, New York 10017
(212) 532-8900

Attorneys for Respondent Transport Workers Union of America

STEPHEN B. MOLDOF
Cohen, Weiss and Simon
605 Third Avenue
New York, New York 10016
(212) 682-6077

Attorneys for Respondent Air Line Pilots Association

PETITION FOR WRIT OF CERTIORARI FILED JANUARY 4, 1980
CERTIORARI GRANTED JUNE 16, 1980

JOINT APPENDIX

Table of Contents

Page

Relevant Docket Entries - District Court (No. 75-0223) 1

Relevant Docket Entries - Court of Appeals (No. 78-1056) 5

Relevant Docket Entries - Court of Appeals (No. 78-1098) 8

Relevant Docket Entries - Court of Appeals (No. 78-1141) 12

Complaint 15

Answer of Air Line Pilots Association, International 24

Answer of Transport Workers Union 31

Motion to dismiss of Air Line Pilots Association, International 39

Motion to dismiss of Transport Workers Union 40

Memorandum opinion of the district court, dated July 7, 1977 (Reference to Appendix B to Petition of Certiorari) 42

Order of the district court granting in part and denying in part the defendants' motions to dismiss, dated July 7, 1977 (Reference to Appendix C to Petition of Certiorari) 42

Motion of Air Line Pilots Association, International to modify the district court's order for purposes of certification pursuant to 28 U.S.C. §1292(b) and to modify the district court's memorandum 43

Conditional motion of Northwest Airlines for entry of final judgment, pursuant to R. 54(b), Fed. R. Civ. P. ..44

Order of the district court granting motions for modification and certification, dated July 28, 1977 46

Order of the court of appeals granting petition for leave to appeal pursuant to 28 U.S.C. §1292(b) 48

Order of the district court entering final judgment, dated January 11, 1978 50

Notice of appeal of Northwest Airlines 52

Opinion of the court of appeals, dated August 30, 1979 (Reference to Appendix D to Petition of Certiorari) 53

Order of the court of appeals, dated August 30, 1979 (Reference to Appendix E to Petition of Certiorari) 53

Order of the court of appeals, dated October 5, 1979, vacating the order of August 30, 1979 (Reference to Appendix F to Petition of Certiorari) 53

Judgment of the court of appeals, dated October 5, 1979 (Reference to Appendix G to Petition of Certiorari) 53

Order of the court of appeals denying petition for rehearing, dated October 9, 1979 (Reference to Appendix H to Petition of Certiorari) 53

Order of the Supreme Court granting certiorari, dated June 16, 1980 54

RELEVANT DOCKET ENTRIES
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA
DOCKET NO. 75-0223

Date	Filings - Proceedings
1975	
Feb 18	COMPLAINT; appearance; request pursuant to Rule 34
Feb 18	SUMMONS, Copies (2) and copies (2) of complaint issued. #1 ser. 2-28-7 #2 ser. 2-27-75.
May 30	ANSWER by deft. #1 to the complaint; c/m 5-29-75. Appearance of A. Andrew Giangreco.
May 30	MOTION by deft. #2 to dismiss; P&A; c/m 5-30-75. Appearance of Donald J. Capuano as counsel.
Jun 24	MEMORANDUM by pltff. of points and authorities in opposition to motion of Deft. #2 to dismiss or stay; c/m 6-23-75.
Jun 27	REPLY by deft. #2 to pltff's opposition to motion to dismiss; c/m 6-27-75.
Sept 18	MEMORANDUM of additional points and authorities on the subject of Union liability; c/m 9-17-75.
Oct 15	MOTION of deft. to dismiss complaint heard, argued and taken under advisement. Gasch, J.
Nov 11	MEMORANDUM of the Court denying motion of deft. to dismiss complaint. (N) Gasch, J.
Nov 11	ORDER denying motion of deft. to dismiss complaint. (N) Gasch, J.

Date	Filings - Proceedings
Dec 4	ANSWER of deft. #2 to complaint; c/m 12-4-75.
1976	
Jan 14	SUPPLEMENT by pltff. to request for production of documents by deft. #1; c/m 1-12-76.
Jan 14	SUPPLEMENT by pltff. to request for production of documents by deft. #2; c/m 1-12-76.
Mar 30	INTERROGATORIES of pltff. to deft.; c/m 3-24-76.
Jul 2	STIPULATION regarding discovery, approved. (FIAT) (N) Gasch, J.
Jul 7	SUPPLEMENTAL response by deft. #2 to request for production of documents; c/m 7-7-76.
Jul 26	REPLY by pltff. to Air Line Pilots Association's response to pltff's Rule 34 request; c/m 7-22-76.
Sept 29	MOTION by pltff. to compel production; Memorandum; table of contents; table of authorities; Exhibit A & B; c/m 9-24-76 and c/s 9-29-76.
Oct 29	MEMORANDUM of Air Line Pilots Association, International in opposition to motion to compel; c/m 10-29-76.
Oct 29	AFFIDAVIT of Stephen B. Moldof; exhibit A through M. c/m 10-29-76.
Oct 29	AFFIDAVIT of Rosalind A. Kochman. c/m 10-29-76.
Nov 5	RESPONSE by pltff. to deft. #1's notice of deposition and request for production of documents; c/m 11-2-76.
Nov 18	REPLY Memorandum by pltff.; table of contents; Exhibit A, B & C; affidavit of service by mail 11-17-76.

Date	Filings - Proceedings
Dec 23	MOTION of pltff. to compel additional discovery heard, argued and taken under advisement. (Rep: Robert Weber) Gasch, J.
1977	
Jan 24	NOTICE by deft. #1 to take deposition of all persons currently employed by pltff. who were witness to collective bargaining agreement between pltff. and deft. #1 on Nov. 18, 1976; c/m 10-15-76.
Feb 2	MOTION by deft. #2 to dismiss; P&A; table of contents; table of authorities; Exhibit A; c/m 1-27-77.
Mar 11	MEMORANDUM by pltff. in opposition to deft. #2's motion to dismiss; table of contents; table of authorities; c/m 3-10-77.
Mar 18	MOTION of deft #1 to dismiss, memorandum, c/m 3-16-77
Apr 4	MEMORANDUM by pltff. in opposition to motion of deft. #1 to dismiss c/m 3-29-77.
Apr 7	REPLY Memorandum by deft. #2 of points and authorities in support of motion to dismiss of deft. #2; table of contents; table of authorities; Exhibit A & B; c/m 4-7-77.
Apr 12	ORDER filed Apr. 8, 1977 holding in abeyance motion of pltff. to compel defts. to produce certain documents. (N) Gasch, J.
Jun 24	MOTION of deft. to dismiss complaint heard, argued & taken under advisement. (Rep. Regis Griffey) Gasch, J.
Jul 11	MEMORANDUM of the Court. (N) Gasch, J.
Jul 12	ORDER filed July 11, 1977 granting in part and denying in part deft's motion to dismiss complaint. (N) Gasch, J.

Date	Filings - Proceedings
Jul 18	MOTION by deft. #2 to modify court's order for purposes of certification pursuant to 28 USC, 1292(b) and to modify court's memorandum; memorandum; c/m 7-18-77.
Jul 27	MOTION of pltff. for entry of Final Judgment pursuant to R. 54(b), FRCP; c/m 7-26-77.
Jul 27	MEMORANDUM of pltff. in opposition to deft. #2's motion to certify for appeal pursuant to 28 USC, 1292(b) and in support of conditional motion for entry of judgment; c/m 7-26-77.
Aug 2	ORDER filed July 29, 1977 granting in substance and denying in substance pltff's motion for production of documents. (N) Gasch, J.
Aug 2	ORDER filed July 29, 1977 granting motion of deft. to amend Court's order dated July 7, 1977 by the deletion of footnote 18 at page 7. (N) Gasch, J.
1978	
Jan 9	CERTIFIED copy of USCA order granting petitions for permission to appeal pursuant to 28 USC, 1292(b) and the Clerk of the District Court is requested to certify and transmit the record on appeal at his earliest convenience.
Jan 12	ORDER filed Jan. 11, 1978 that final judgment is entered as to order dated 7-7-77, dismissing without prejudice, pltff's claim for reimbursement from defts for some portion of its liability with respect to the Equal Pay Act. (N) Gasch, J.
Jan 23	APPEARANCE of Philip A. Lacovara as counsel for pltff. and withdraw of appearance of John L. Richardson as counsel for same; c/m. CAL/N.

Date	Filings - Proceedings
Jan 16	RECORD on Appeal delivered to USCA; Receipt acknowledged. (USCA No. 78-1056 Transport Workers) (USCA No. 78-1098 ALPA)

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT
DOCKET NO. 78-1056

Date	Filings - Proceedings
1-19-78	Certified Original Record (2 volumes); no transcript (n-3) (Also record in No. 78-1098).
1-19-78	See order of 1-6-78 in Nos. 77-8044 & 77-8045 for text of questions to be addressed in the briefs.
2-7-78	1-Letter from EEOC advising that they will participate as an amicus curiae pursuant to order of 1/10/78 in Misc. Nos. 77-8044 & 77-8045.
2-21-78	4-Appellee's (Northwest Airlines) motion to consolidate Nos. 78-1056, 78-1098 and 78-1141 and to establish briefing schedule (m-21)
3-7-78	Clerk's order that Nos. 78-1056, 78-1098 and 78-1141 are consolidated for consideration on the merits and that a briefing schedule is established as follows: Initial briefs in Nos. 78-1056 and 78-1098 - March 20, 1978, Northwest Airlines, Inc. brief of appellant in 78-1141 and as appellees in 78-1056 and 78-1098 - April 24, 1978. Appellants' (TWU and

Date	Filings - Proceedings
	ALPA) responsive briefs - May 29, 1978 and Northwest's reply brief, if any, - June 21, 1978. The brief of EEOC as amicus curiae should be filed on the date provided in Rule 29 of FRAP.
3-21-78	Clerk's order granting the motion of the Air Lines Pilots Association, International for extension of time (in 78-1098) and the briefing schedule in these cases is modified as follows: The initial briefs in 78-1056 and 78-1098 - April 3, 1978: Northwest Airlines, Inc. brief as appellant in 78-1141 and as appellee in 78-1056 and 78-1098 - May 8, 1978; Appellants' ("TWU" and "ALPA") responsive briefs - June 12, 1978; Northwest's reply brief, if any, in 78-1141 should be filed on or before July 5, 1978
4-11-78	Clerk's order granting appellant's motion to extend time to file briefs and the brief schedule is amended as follows: April 17 - Initial Briefs in 78-1056 and 78-1098 May 22 - Northwest Airlines, Inc. brief as appellant in 78-1141 and as appellee in 78-1056 and 78-1098, June 26 - Appellants' (TWU and ALPA) responsive briefs and July 19 - Northwest's reply brief, if any, in 78-1141
4-17-78	15-Appellant's brief (m-14) and (corrected brief m-21)
4-17-78	10-Joint Appendix (m-17)
5-17-78	Clerk's order granting appellant's motion to extend time to file briefs and the briefing schedule is modified as follows: June 16 - Northwest's brief as appellant in No. 78-1141 and as appellee in Nos. 78-1056 and 78-1098, Appellants (TWU & ALPA) responsive briefs - July 21, 1978 and August 12 - Northwest's reply brief in No. 78-1141

Date	Filings - Proceedings
6-16-78	4-Amicus curiae (EEOC) motion for leave to file brief and present oral argument (m-16)
6-19-78	15-Appellee's (Northwest Airlines, Inc.) brief (m-16)
6-23-78	15-Brief of amicus curiae (EEOC) (m-16)
7-21-78	15-Appellee's [sic] (ALPA) brief (m-21)
8-30-78	15-Reply brief of Northwest Airlines, Inc. (m-28)
1-24-79	Argued before CJ Wright*, Robinson, CJ and Richey, US District Court Judge for DC
8-30-79	Opinion for the Court filed by District Judge Richey.
8-30-79	Per Curiam order that the judgment of the District Court appealed from in these causes is affirmed in part, in accordance with the opinion of this Court filed herein this date; with respect to that portion of the case which is not the subject of the foregoing affirmance, the record is remanded to the District Court for further proceedings, also in accordance with the opinion of this Court filed herein this date.
9-13-79	11-Northwest Airlines, Inc. petition for rehearing (m-12)
10-5-79	Per Curiam order, sua sponte, that the order filed August 30, 1979; CJ Wright, Robinson, CJ and Richey, US District Court Judge for DC
10-5-79	Judgment by this Court that the judgment of the District Court insofar as it pertains to the Equal Pay Act is affirmed, but said judgment to the extent that it relates to the Title VII claim, is vacated in order that the District Court may consider the issue of laches, and this case is remanded to the District Court for further proceedings, all in accordance with the opinion of this Court filed herein on August 30, 1979.

Date	Filings - Proceedings
10-9-79	Per Curiam order denying appellee's petition for rehearing; CJ Wright, Robinson, CJ and Richey, US District Court Judge for DC
10-18-79	4-Appellee's motion for stay of mandate (m-18) (Filed by Northwest Airlines, Inc.)
12-7-79	Per Curiam order granting appellee's motion for stay of mandate pursuant to Rule 41(b) of FRAP; CJ Wright, Robinson, CJ and Richey, US District Court Judge for DC
1-10-80	Notification from Clerk Supreme Court that the petition for writ of certiorari was filed on 1-4-80 in S.C. No. 79-1056
1-10-80	Certified copy of order from Clerk Supreme Court that the petition for writ of certiorari was filed on 1-4-80 in S.C. No. 79-1056 and is now pending.

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT
DOCKET NO. 78-1098

Date	Filings - Proceedings
2-6-78	Certified Original Record (2 vols.), no transcript (n-3) (This is also the record in No. 78-1056)
2-6-78	See order of 1/6/78 in Nos. 77-8044 & 77-8045 for text of questions to be addressed in the briefs
2-7-78	1-Letter from EEOC advising that they will participate as an amicus curiae pursuant to order of 1/10/78 in Misc. Nos. 77-8044 & 77-8045
2-21-78	4-Appellee's (Northwest Airlines) motion to consolidate Nos. 78-1056, 78-1098 and 78-1141 and to establish briefing schedule (m-21)

Date	Filings - Proceedings
3-7-78	Clerk's order that Nos. 78-1056, 78-1098 and 78-1141 are consolidated for consideration on the merits. . . .
4-17-78	10-Joint Appendix (m-17)
4-17-78	15-Appellant's brief (m-17)
6-16-78	4-Amicus curiae (EEOC) motion for leave to file brief and present oral argument (m-16)
6-19-78	15-Appellee's (Northwest Airlines, Inc.) brief (m-16)
6-23-78	Clerk's order directing Clerk to file EEOC's brief amicus curiae and that the motion to present oral argument is denied without prejudice to resubmission at the time counsel is notified of the scheduling of oral argument.
6-23-78	15-Brief of amicus curiae (EEOC) (m-16)
7-21-78	15-Appellant's (ALPA) brief (m-21)
8-30-78	15-Reply brief of Northwest Airlines, Inc. (m-28)
9-18-78	Clerk's order, sua sponte, that Nos. 78-1056, et al. and No. 78-1365 be calendared on the same day before the same panel
12-26-78	4-Motion of EEOC, amicus curiae, for leave to present oral argument (m-22)
1-12-79	Clerk's order that the following times are allotted for oral argument: Appellant/cross-appellee - 20 minutes. Cross-appellee/Appellant - 20 minutes and EEOC - 10 min.
1-24-79	Argued before CJ Wright*, Robinson, CJ and Richey, US District Court Judge for DC
8-30-79	Opinion for the Court filed by District Judge Richey.
8-30-79	Per Curiam order that the judgment of the District Court appealed from in these causes is affirmed in part, in accordance with the opinion

Date	Filings - Proceedings
	of this Court filed herein this date; with respect to that portion of the case which is not the subject of the foregoing affirmance, the record is remanded to the District Court for further proceedings, also in accordance with the opinion of this Court filed herein this date.
9-13-79	11-Northwest Airlines, Inc., petition for rehearing (m-12)
10-5-79	Per Curiam, sua sponte, that the order filed August 30, 1979 is vacated; CJ Wright, Robinson, CJ and Richey, US District Court Judge for DC
10-5-79	Judgment by this Court that the judgment of the District Court insofar as it pertains to the Equal Pay Act is affirmed, but said judgment to the extent that it relates to the Title VII claim, is vacated in order that the District Court may consider the issue of laches, and this case is remanded to the District Court for further proceedings, all in accordance with the opinion of this Court filed herein on August 30, 1979.
10-9-79	Per Curiam order denying appellee's petition for rehearing; CJ Wright, Robinson, CJ and Richey, US District Court Judge for DC
10-18-79	4-Appellee's motion for stay of mandate (m-18) (Filed by Northwest Airlines, Inc.)
10-23-79	1-Transcript of oral argument
11-7-79	Letter dated 10-31-79 from counsel for Air Line Pilots Association that they take no position on the motion to stay the mandate (m-31)
12-7-79	Per Curiam order granting appellee's motion for stay of mandate pursuant to Rule 41(b) of FRAP; CJ Wright, Robinson, CJ and Richey, US District Court Judge for DC

Date	Filings - Proceedings
1-2-80	Per Curiam order granting appellee (Northwest) motion for leave to file opposition to bill of costs and that costs in the amount of $359.65 are awarded to appellee (Air Line Pilots) and taxed against appellee (Northwest); CJ Wright, Robinson, CJ and Richey, US District Court Judge for DC
1-10-80	Notification from Clerk, Supreme Court that the petition for writ of certiorari was filed on 1-4-80 in S.C. No. 79-1056
1-10-80	Certified copy of order from Clerk, Supreme Court that the petition for writ of certiorari was filed on 1-4-80 in S.C. No. 79-1056 and is now pending

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT
DOCKET NO. 78-1141

Date	Filings - Proceedings
2-21-78	Certified Original Record (no transcript) (n-3)
2-21-78	4-Appellant's (Northwest Airlines, Inc.) motion to consolidate Nos. 78-1056, 78-1098 and 78-1141 and to establish briefing schedule (m-21)
3-7-78	Clerk's order that Nos. 78-1056, 78-1098 and 78-1141 are consolidated for consideration on the merits. . . .
4-17-78	10-Joint Appendix (m-17)
6-16-78	4-Amicus curiae (EEOC) motion for leave to file brief and present oral argument (m-16)
6-19-78	15-Appellant's (Northwest Airlines, Inc.) brief (m-16)
6-23-78	Clerk's order directing Clerk to file EEOC's brief amicus curiae and that the motion to present oral argument is denied without prejudice to resubmission at the time counsel is notified of scheduling of oral argument.
6-23-78	15-Brief of amicus curiae (EEOC) (m-16)
7-21-78	15-Appellee's (ALPA) brief (m-21)
8-30-78	15-Reply brief of Northwest Airlines, Inc. (m-28)
9-18-78	Clerk's order, sua sponte, that Nos. 78-1056, et al. and No. 78-1365 be calendared the same day and before the same panel
12-26-78	4-Motion of EEOC, amicus curiae, for leave to present oral argument (m-22)
1-12-79	Clerk's order that the following times are allotted for oral argument: Appellant/cross-appellee - 20 minutes. Cross-appellee/Appellant - 20 minutes, EEOC - 10 min.

Date	Filings - Proceedings
8-30-79	Opinion for the Court filed by District Judge Richey.
8-30-79	Per Curiam order that the judgment of the District Court appealed from in these causes is affirmed in part, in accordance with the opinion of this Court filed herein this date; with respect to that portion of the case which is not the subject of the foregoing affirmance, the record is remanded by the District Court for further proceedings, also in accordance with the opinion of this Court filed herein this date.
9-13-79	11-Northwest Airlines, Inc., petition for rehearing (m-12)
10-5-79	Per Curiam order, sua sponte, that the order filed August 30, 1979 is vacated; CJ Wright, Robinson, CJ and Richey, US District Court Judge for DC
10-5-79	Judgment by this Court that the judgment of the District Court insofar as it pertains to the Equal Pay Act is affirmed, but said judgment to the extent that it relates to the Title VII claim, is vacated in order that the District Court may consider the issue of laches, and this case is remanded to the District Court for further proceedings, all in accordance with the opinion of this Court filed herein on August 30, 1979.
10-9-79	Per Curiam order denying appellee's petition for rehearing; CJ Wright, Robinson, CJ and Richey, US District Court Judge for DC
10-18-79	4-Appellant's motion to stay of mandate (m-18)
10-23-79	1-Transcript of oral argument.
11-7-79	Letter dated 10-31-79 from counsel for Air Line Pilots Association that they take no position on the motion to stay the mandate (m-31)

Date	Filings - Proceedings
12-7-79	Per Curiam order granting appellee's motion for stay of mandate pursuant to Rule 41 of FRAP; CJ Wright, Robinson, CJ and Richey, US District Court Judge for DC
1-2-80	Per Curiam order granting appellee's (Northwest) motion for leave to file opposition to bill of costs and the total amount of $359.65 is awarded to appellee (Air Line Pilots) and taxed against appellee (Northwest); CJ Wright, Robinson, CJ and Richey US District Court Judge for DC
1-2-80	4-Appellee's (Northwest) opposition to bill of costs (m-26)
1-2-80	4-Appellee's (Air Line Pilots) reply to opposition to bill of costs - filed per above order.
1-10-80	Notification from Clerk, Supreme Court that the petition for writ of certiorari was filed on 1-4-80 in S.C. No. 79-1056.
1-10-80	Certified copy of order from Clerk, Supreme Court that the petition for writ of certiorari was filed on 1-4-80 in S.C. No. 79-1056 and is now pending.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AIRLINES, INC.,
Plaintiff,

vs.

COMPLAINT

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO, and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Defendants.

Declaratory Relief
28 U.S.C. §2201

Plaintiff, NORTHWEST AIRLINES, INC. [hereinafter "NWA"], for its claim against the defendants, states and alleges as follows:

1. NWA is, and at all times herein material has been, a Minnesota citizen and corporation, with its principal office and place of business in Minnesota, and is and has been a common carrier by air engaged in interstate commerce under Certificates of Convenience and Necessity issued by the Civil Aeronautics Board pursuant to the Federal Aviation Act of 1958 as amended [49 U.S.C. § §1301 et seq., esp. 1371] (hereinafter "FAA") and is subject to the provisions of the Railway Labor Act [45 U.S.C. § §151-188, except 153] (hereinafter "RLA").

2. Defendant Transport Workers Union of America, AFL-CIO [hereinafter "TWU"] is and at all times herein material has been a national labor union comprised of many hundreds of members, with a principal office in New York; TWU is also present and doing business in the District of

Columbia, with an office, a place of business and an officer located therein; it is amenable to the jurisdiction of, and subject to proper venue in, the above named Court; TWU is not a Minnesota citizen.

3. Defendant Air Line Pilots Association, International [hereinafter "ALPA"] is and at all times herein material has been a national labor union comprised of many hundreds of members, with a principal office in the District of Columbia; it is amenable to the jurisdiction of, and subject to proper venue in, the above named Court; ALPA is not a Minnesota citizen.

4. Jurisdiction of this cause is founded on the RLA, the FAA, the Equal Pay Act of 1963 [29 U.S.C. §206(d)] (hereinafter "EPA"), Title VII of the Civil Rights Act of 1964 [42 U.S.C. §2000e] (hereinafter "Title VII") and on the Judicial Code [28 U.S.C. § §1331, 1332 and 1337] as a civil action in which the matter in controversy exceeds the sum or value of $10,000 [exclusive of interest and costs] and arises under the Constitution, laws or treaties of the United States or is between citizens of different states, or is a civil action arising under an Act of Congress regulating commerce. Declaratory relief is founded on and sought pursuant to the provisions of 28 U.S.C. § 2201 in an actual case or controversy, as hereinafter more particularly alleged.

5. On December 17, 1946, pursuant to and in accordance with the RLA, the National Mediation Board (hereinafter "NMB") certified the Air Line Stewards and Stewardesses Association, International (hereinafter "ALSSA") as the duly designated collective bargaining representative of NWA's female Cabin Attendants [Stewardesses]; this certification was amended by NMB on October 21, 1948 to provide that ALSSA also was the duly designated collective bargaining representative of NWA's Pursers, which certifi-

cation was amended again by NMB on June 20, 1950 to include NWA's Flight Service Attendants, the then male counterparts of Stewardesses. On July 7, 1961 ALSSA having affiliated with defendant TWU, the NMB, pursuant to and in accordance with the RLA, certified TWU, under the name and style of "Air Line Stewards and Stewardesses Association, International, Transport Workers Union of America, AFL-CIO," as the duly designated collective bargaining representative of all Cabin Attendants and Pursers of NWA. TWU thereafter continued as the certified and designated collective bargaining representatives of all NWA's Cabin Attendants and Pursers to and until September 17, 1971, on which date TWU was replaced by ALPA, pursuant to and in accordance with the RLA, as the collective bargaining representative of NWA's Cabin Attendants and Pursers and as so certified by the NMB.

6. At all times from December 17, 1946 through December 14, 1972, pursuant to and in accordance with the RLA and in response to union demands, NWA has negotiated and entered into a series of collective bargaining contracts with the then incumbent union, ALSSA, TWU or ALPA, respectively and successively. Since the inception of the Purser classification in 1947 and continuing after enactment and effectiveness of EPA and Title VII, there were differentials in salary [including pensions when negotiated] between NWA's Pursers and Cabin Attendants as demanded by the respective defendant union, when incumbent, including TWU and ALPA, and which differentials were made an integral part of the collective bargaining negotiations and of all contracts entered into and implemented between NWA and the respective incumbent defendant union. TWU sponsored and participated in such negotiations, entered into and enforced such collective

bargaining contracts with NWA from July 7, 1961, and particularly during the years 1965 through 1971, until TWU was replaced by ALPA on September 17, 1971. Thereafter, during 1972, ALPA sponsored and participated in collective bargaining negotiations, entered into and enforced such a collective bargaining contract with NWA dated December 14, 1972 and retroactive to January 1, 1972. This most recent collective bargaining contract with NWA continued, as demanded by ALPA, a salary differential between Cabin Attendants and Pursers and the same presently remains in effect though now subject to "re-openers" and negotiations under RLA.

7. On July 15, 1970, a class action entitled "Mary P. Laffey, et al, Plaintiffs vs. Northwest Airlines, Inc., Defendant," [Civil Action No. 2111-70 in the Office of the Clerk of the above-named Court] was commenced. On May 20, 1974, after Trial, said Court entered its Judgment which, among other things, found that, at all times since 1964 and 1965, respectively, the collective bargaining contracts between NWA, TWU and ALPA, as hereinbefore alleged, has violated EPA and Title VII by providing for the payment of lower salaries for female Cabin Attendants than for male Pursers for jobs which said Judgment determined required equal skill, effort and responsibility and which have been performed under similar working conditions. Said Judgment ordered NWA to pay amounts of "back pay" or damages and interest for at least the years 1968 through 1974, the judgment date, based on the TWU/ALPA collectively bargaining contractual differential in salaries for Cabin Attendants and Pursers, and which amounts so ordered aggregate approximately $20 million at least, if said Judgment is not reversed.

8. On May 28, 1974, NWA filed motions for leave to

bring, as cross and third-party claims, the same claims herein made against TWU and ALPA, in the action described in Paragraph 7 above.

9. On July 10, 1974 said motions were, as requested by TWU and ALPA, denied, because they were too late and likely to confuse or delay the determination in said action described in Paragraph 7 above. The Orders denying said motions are non-appealable separately, as NWA is advised, but the same are being urged as erroneous in connection with the appeal by NWA from the Judgment, which appeal is described in Paragraph 10 below.

10. On July 17, 1970 [sic], NWA served and filed its appeal to the United States Court of Appeals for the District of Columbia Circuit from the Judgment identified in Paragraph 7 above, supporting the same by appropriate Notice and by a $24,500,000 supersedeas bond. During the pendency of that appeal, due to an Order of Stay, there has been and will be no final accounting for or payment of any past discriminatory underpayments due or payable to any particular plaintiff pursuant to the terms of the aforementioned Judgment. Nevertheless, while such appeal is pending, this case presents a justiciable controversy, requiring an ultimate trial and a decision on evidence, some of which, if not all, may be required to be presented anew herein, despite the voluminous Record already made in the trial of the case identified in Paragraph 7 hereof. This circumstance argues for a prompt proceeding while witnesses are still available and before their memories have further faded or changed with their status, relationships and conditions of life.

11. Since NWA has now been judicially found monetarily liable by Judgment to the class of female Cabin Attendants represented by plaintiffs in the action described in Paragraph 7 hereof because the collective bargaining

contracts were held to have violated the EPA and Title VII, NWA seeks a declaration and adjudication that TWU and ALPA are also liable, in turn and respectively, by virtue of their participation in the negotiation, execution and implementation of the collective bargaining contracts which provided for discrimination in salaries between the class of female Cabin Attendants and Pursers, for some or all of the liability so determined.

COUNT TWO

12. NWA realleges the allegations of Paragraphs 1 through 11 of COUNT ONE.

13. Since NWA has now been judicially found monetarily liable by Judgment to the class of female Cabin Attendants represented by plaintiffs in the action described in Paragraph 7 hereof because the collective bargaining contracts were held to have violated the EPA, NWA seeks a declaration and adjudication that TWU and ALPA are also liable, in turn and respectively, under the EPA, for their collective bargaining acts and contracts which caused or attempted to cause NWA to discriminate in salaries between the class of female Cabin Attendants and Pursers, in violation of EPA, particularly §206(d)(2) thereof, for some or all of the liability so determined.

COUNT THREE

14. NWA realleges the allegations of Paragraphs 1 through 13 of COUNT ONE and COUNT TWO.

15. NWA believes and alleges that its claims and rights

against TWU and ALPA have ripened or matured, and in any event contends that this action should be allowed to proceed against TWU and ALPA during the pendency of the aforementioned appeal. Among other things, and in addition to the need for evidence preservation, the duties and requirements of collective bargaining under RLA as well as business, budgeting and planning by NWA make it essential that a judicial determination be obtained, as quickly as feasible, concerning the extent to which TWU and ALPA are required by law to share the liability of NWA judicially determined in the action described in Paragraph 7 hereof.

16. NWA has commenced this action and seeks the further declaration of the Court that as a substantive and procedural matter this action properly may be maintained, processed and tried, notwithstanding the pendency of the appeal and the absence of any ultimate accounting and payment in the action described in Paragraph 7 hereof and elsewhere herein.

WHEREFORE, plaintiff prays for a Judgment as follows:

A. Adjudging and decreeing that this action may be maintained, processed and tried, notwithstanding the pendency of the appeal and the absence of any final accounting and payment in or as a result of the Judgment in the action described in Paragraph 7 hereof;

B. Adjudging and decreeing that each defendant is liable to pay a proportion, to be stated in said Judgment, of any monetary liability assessed against NWA in the action described in Paragraph 7 hereof for the EPA and/or Title VII violations finally found therein and during the respective periods for which each defendant contracted with NWA for salaries held to be discriminatory under the EPA and Title VII;

C. Adjudging and decreeing that each defendant is liable to pay a proportion, to be stated in said Judgment, of any monetary liability assessed against NWA in the action described in Paragraph 7 hereof for causing or attempting to cause NWA to violate the EPA as finally found therein and during the respective periods for which each defendant contracted with NWA for salaries held to be discriminatory under the EPA;

D. Adjudging and decreeing that each defendant is liable to pay NWA a proportion, to be stated in said Judgment, of the costs, attorneys' fees and expenses incurred by NWA and ordered to be paid by NWA in the action described in Paragraph 7 hereof and in the appeal described in Paragraph 10 hereof and in any and all further proceedings resulting therefrom;

E. Ordering that the above Court shall retain jurisdiction for so long as may be necessary to determine and award the actual monetary liability, attorneys' fees and expenses, as described in Paragraphs B, C and D above, arising out of the action and appeal described in Paragraphs 7 and 10 hereof;

F. Awarding NWA its costs and attorneys' fees incurred herein;

G. Awarding NWA such other and further relief as the Court may deem just and equitable.

Dated: February 12, 1975.

DORSEY, MARQUART, WINDHORST, WEST & HALLADAY

By /s/ Henry Halladay
Henry Halladay
2300 First National Bank Building
Minneapolis, Minnesota 55402
Telephone: [612] 340-2780

VERNER, LIIPFERT, BERNHARD AND McPHERSON

By /s/ John L. Richardson
John L. Richardson
Suite 1100
1660 L Street, N.W.
Washington, D. C. 20036
Telephone: [202] 296-6515
Attorneys for Plaintiff

Mr. J. A. Abbott
Vice President, Law
Northwest Airlines, Inc.
Minneapolis/St. Paul International Airport
St. Paul, Minnesota 55111

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AIRLINES, INC.,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil Action No.
	)	75-0223
TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,	)	
	)	
Defendants	)	

ANSWER OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

Defendant, Air Line Pilots Association, International ("ALPA"), answers the Complaint as follows:

COUNT I

1. On information and belief, admits the allegations of Paragraph 1 of the Complaint.

2. On information and belief, admits that the Transport Workers Union of America is a national labor union with many members, and otherwise denies knowledge or information sufficient to form a belief as to the allegations of paragraph 2 of the Complaint.

3. Admits the allegations of paragraph 3 of the Complaint, except denies that jurisdiction or venue properly lie in this action against ALPA.

4. Denies the allegations of paragraph 4 of the Complaint, except admits that Northwest Airlines, Inc. ("Northwest") purports to seek declaratory relief in this action.

5. Denies knowledge or information sufficient to form a belief as to the allegations in paragraph 5 of the Complaint, except admits that ALPA was duly certified by the National Mediation Board, on or about September 17, 1971, as the collective bargaining representative for Northwest's cabin attendants and pursers, pursuant to and in accordance with the Railway Labor Act.

6. Denies knowledge or information sufficient to form a belief as to any of the allegations in paragraph 6 of the Complaint which pertain to matters which preceded ALPA's certification on or about September 17, 1971, as the collective bargaining representative for Northwest's cabin attendants and pursers; admits that, after negotiation and mediation in 1972, Northwest and ALPA entered into a collective bargaining agreement dated December 14, 1972, for cabin attendants and pursers; admits that certain payments retroactive to January 1, 1972, were provided; admits that said agreement continued certain differentials in pay between cabin attendants and pursers; admits that Northwest has refused to agree to any agreement which eliminates such differentials or to ALPA efforts to eliminate such differentials through negotiations; and otherwise denies the allegations of paragraph 6 of the Complaint.

7. With respect to paragraph 7, admits that on or about July 15, 1970, an action entitled "*Mary P. Laffey, et al., Plaintiffs v. Northwest Airlines, Inc., Defendants*," Civil

Action No. 2111-70, was commenced in this Court; admits that on or about May 20, 1974, after trial, the Court entered a judgment, after entry of findings of fact and conclusions of law on or about November 12, 1973, and of a subsequent order on or about April 3, 1974, refers to said May 20, 1974 judgment for the contents thereof; denies knowledge or information sufficient to form a belief as to the amount of potential liability of Northwest if said judgment is not reversed, and otherwise denies the allegations of paragraph 7 of the Complaint.

8. With respect to paragraph 8, admits that on or about May 28, 1974, Northwest filed motions for leave to bring, as cross and third-party claims, certain claims against ALPA and the Transport Workers Union, and refers to said motions for the contents thereof.

9. With respect to paragraph 9, admits that by orders dated July 10, 1974, Northwest's motions to assert cross and third-party claims against ALPA and the Transport Workers Union were denied; admits that Northwest has appealed from the denial of said motions and that said appeal has been argued before the Court of Appeals for the District of Columbia and is presently pending, and otherwise denies the allegations of paragraph 9 of the Complaint. Whether the orders denying said motions are appealable separately presents a question of law as to which no answer is required.

10. With respect to paragraph 10, admits that on or about July 17, 1974, Northwest served and filed an appeal to the United States Court of Appeals for the District of Columbia from, *inter alia,* the judgment of the District Court entered on or about May 20, 1974, that sometime thereafter, Northwest filed with the Court a $24,500,000 supersedeas bond; admits that Northwest has declined to make any final accounting for a payment of any discriminatory under-

payments due or payable to any particular plaintiff, and otherwise denies the allegations of paragraph 10 of the Complaint.

11. Admits that Northwest purports to seek a declaration and adjudication of the liability of ALPA and the Transport Workers Union, and otherwise denies the allegations of paragraph 11 of the Complaint.

COUNT II

12. Repeats and realleges, as if fully set forth herein, the answers with respect to paragraphs 1 through 11 of the Complaint.

13. Admits that Northwest purports to seek a declaration and adjudication of the liability of ALPA and the Transport Workers Union, and otherwise denies the allegations of paragraph 13 of the Complaint.

COUNT III

14. Repeats and realleges, as if fully set forth herein, the answers with respect to paragraphs 1 through 13 of the Complaint.

15. Denies knowledge or information as to Northwest's beliefs, and otherwise denies the allegations of paragraph 15 of the Complaint.

16. Admits that Northwest has purported to commence this action as a means of obtaining certain declaratory relief, and otherwise denies the allegations of paragraph 16 of the Complaint.

AFFIRMATIVE DEFENSES

17. The Complaint fails to state a claim against ALPA upon which relief against ALPA can be granted.

18. The Court lacks jurisdiction over the subject matter of the Complaint or to grant the relief sought by the Complaint as against ALPA.

19. Following the issuance of judgment by the Court in *Laffey, et al. v. Northwest Airlines, Inc.*, Civil Action No. 2111-70, Northwest filed a motion for leave to assert cross-claims against ALPA, which Northwest asserts are the same claims it has now set forth against ALPA in the instant action. Said motion was denied by Order of the District Court dated July 10, 1974, and Northwest has appealed from said denial. That appeal has already been argued before the United States Court of Appeals for the District of Columbia, and is presently pending. This action duplicates the prior pending action, and should be dismissed.

20. Northwest, by this action, purports to seek, *inter alia*, declaratory relief against ALPA. The Court cannot and should not entertain such a claim while the claim is presently being considered in another prior pending action, as set forth in paragraph 19 above.

21. Northwest has not paid any monetary sums by way of relief to plaintiffs in the case of *Laffey, et al. v. Northwest Airlines, Inc.*, Civil Action No. 2111-70. Accordingly, any claim Northwest might conceivably have for contribution and/or indemnification as against ALPA is not ripe, and does not present a justiciable controversy.

22. This action is barred by the doctrine of *res judicata* and/or collateral estoppel.

23. This Court lacks jurisdiction over any claims asserted in the Complaint by Northwest against ALPA by reason of

alleged violations of the Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1964.

24. The Complaint fails to state a claim against ALPA upon which relief can be granted against ALPA by reason of alleged violations of the provisions of the Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1964.

25. Northwest elected not to assert any claims against ALPA in *Laffey, et al. v. Northwest Airlines, Inc.*, Civil Action No. 2111-70, despite ALPA's presence as a party to that action, and instead waited until one and one-half years after the completion of trial in that action and until after entry of final judgment to attempt to assert the claims which it now again attempts to assert herein. Northwest's delay in asserting claims of which it possessed full knowledge is a bar to this action against ALPA.

26. This action is barred by the doctrine of laches.

27. Northwest is solely and exclusively liable for any unlawful employment practices applied to its cabin attendants and pursers, including violations of the Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1964, and resulting liability found in *Laffey, et al. v. Northwest Airlines, Inc.*, and ALPA is not liable for any of said violations of the Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1964.

28. Northwest has consistently refused to consider and rejected ALPA efforts to eliminate alleged discriminatory employment practices, including alleged discrimination between cabin attendants and pursers. It has constantly been Northwest's position that no modification of its employment practices and policies to eliminate the alleged discriminatory employment practices found in *Laffey, et al. v. Northwest Airlines, Inc.* was warranted or would be made and that Northwest would not enter into a collective bargaining

agreement with ALPA which would eliminate such practices or enter into an agreement with ALPA consistent with the provisions of the remedy order issued by the District Court in the *Laffey* case. As part of said course of action, Northwest has, most recently and since entry of the District Court Orders in the *Laffey* litigation, consistently refused to negotiate and sign a collective bargaining agreement which would eliminate the alleged discriminatory employment practices found in the *Laffey* litigation or to conclude and sign a collective bargaining agreement consistent with the provisions of the remedy order issued by the District Court in the *Laffey* case. By reason of its course of conduct, Northwest is solely and exclusively responsible for any discriminatory employment practices and resulting liability found by the Court in *Laffey, et al. v. Northwest Airlines, Inc.*, and ALPA is not liable for any of the said violations of the Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1964.

WHEREFORE, it is respectfully requested that the Court enter judgment dismissing the Complaint as against ALPA and granting such other and further relief as may be just and proper to this Court, including reasonable attorneys' fees and the costs and disbursements of this proceeding.

COHEN, WEISS & SIMON
605 Third Avenue
New York, New York 10016

O'DONOGHUE &
O'DONOGHUE
1912 Sunderland Place, N.W.
Washington, D.C. 20036

By /s/ Donald J. Capuano

Attorneys for Air Line Pilots
Association, International

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

NORTHWEST AIRLINES, INC.,	:	Civil Action No. 75-0223 Gasch, J.
Plaintiff,	:	
v.	:	
TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO, and AIRLINE PILOTS ASSOCIATION, INTERNATIONAL,	:	**ANSWER**
Defendants.	:	

Defendant Transport Workers Union of America, AFL-CIO, (hereinafter referred to as TWU), by its attorneys, O'Donnell & Schwartz, and Giangreco, Seay and Manuel, for its answer to the complaint of plaintiff Northwest Airlines, Inc., (hereinafter referred to as Northwest), respectfully alleges:

COUNT ONE

1. Admits each and every allegation contained in paragraph 2 of the complaint, except denies that it is subject to proper venue in the District of Columbia.

2. Denies each and every allegation contained in paragraph 4 of the complaint.

3. Admits each and every allegation contained in paragraph 6 of the complaint, except denies that TWU ever demanded differentials in salary between pursers and cabin attendants.

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 of the complaint.

5. Admits each and every allegation contained in paragraph 10, except denies the allegations that this case presents a justiciable controversy while the appeal is pending and that the circumstances argue for a prompt proceeding.

6. Denies each and every allegation contained in paragraph 11 of the complaint.

COUNT TWO

7. Repeats and realleges its answers with respect to paragraphs 1 through 11 of the complaint.

8. Denies each and every allegation contained in paragraph 13 of the complaint.

COUNT THREE

9. Repeats and realleges its answers with respect to paragraphs 1 through 11 of the complaint.

10. Denies each and every allegation contained in paragraphs 15 and 16 of the complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

11. On May 20, 1974, the Court rendered an adverse decision against Northwest in the case of Mary P. Laffey et al., Plaintiffs, vs. Northwest Airlines, Inc., Defendants, [Civil Action No. 2111-70, filed July 15, 1970, in the office of the clerk of the above-named Court] (hereinafter referred to as the Laffey Action) with respect to claims by plaintiff Laffey that Northwest had violated Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, by maintaining salary differentials between pursers and cabin attendants.

12. On May 28, 1974, after judgment, Northwest filed motions requesting leave to serve TWU with cross and third-party claims for relief in the Laffey Action. By these motions, Northwest sought to assert the same claims against TWU that it is now seeking to assert in this proceeding. Leave to make such service was denied by the Court in the Laffey Action on July 10, 1974.

13. The ruling denying leave to serve TWU with cross and third-party claims is among those challenged by Northwest in an appeal in the Laffey Action now pending before the United States Court of Appeals for the District of Columbia, and the validity of Northwest's rights to bring claims against TWU will be adjudicated by that Court as a part of the disposition of that appeal.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

14. TWU repeats and realleges the allegations set forth in paragraphs 11 and 12 of this answer.

15. Although Northwest had notice of all the facts and all the acts of TWU set forth in the complaint herein as of July 15, 1970, when the Laffey Action commenced, it nevertheless refrained from commencing any action against TWU until May 28, 1974, and from commencing this action until February 18, 1975. During the interval, because of a reorganization of TWU's Local 550 which represented the Northwest Flight Attendants, many of TWU's records pertinent to the defense of this case have been destroyed, and witnesses who would have testified on TWU's behalf are now unavailable. Northwest has been guilty of such laches as should in equity bar it from maintaining this action.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

16. Under the provisions of the Equal Pay Act of 1963 (29 U.S.C. §206(d)), the responsibility not to discriminate among its employees on the basis of sex with respect to rates of pay and concomitant benefits, lies solely upon the employer. The Act mandates that the employer alone pay the higher rate to correct improper differentials of pay and benefits.

17. Plaintiffs in the Laffey Action never filed a charge against TWU with the Equal Employment Opportunities Commission, as required by the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e et seq.). Had TWU been named as a defendant or third-party defendant in

the Laffey Action, the Court would not have had jurisdiction over it to render judgment against it for any Title VII damages.

18. For the reasons set forth in paragraphs 16 and 17 of this answer, this Court lacks jurisdiction to entertain Northwest's complaint under either the Equal Pay Act of 1963 or Title VII of the Civil Rights Act.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

19. TWU repeats and realleges the allegations set forth in paragraphs 16 and 17 of this answer.

20. For the reasons set forth in paragraphs 16 and 17 of this answer, Northwest's complaint fails to state a claim against TWU upon which relief can be granted.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

21. TWU repeats and realleges the allegations set forth in paragraphs 16 and 17 of this answer.

22. Although TWU and Northwest were parties to successive collective bargaining agreements between July, 1961 and September 1971, no right of contribution now exists to Northwest because TWU and Northwest were never under a common obligation or burden to plaintiffs in the Laffey Action.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

23. TWU received no benefit from the violations of the Equal Pay Act of 1963 and of Title VII of the Civil Rights Act of 1964 as determined to have been committed by Northwest in the Laffey Action. Upon information and belief, judgment has been rendered against Northwest in the Laffey Action for $24 million, which are Northwest's accrued profits from such violations. No right to contribution lies against TWU, and any contribution assessed against TWU in favor of Northwest would constitute a windfall gain to Northwest.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

24. At no time did TWU have or exercise any control over Northwest's hiring practices. The determination that Northwest violated the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 is founded upon the assignment of females alone to the cabin attendants' position and the assignment of males alone to the purser and flight service attendants' position.

25. The restriction requiring that females be assigned to cabin attendant positions and males to purser and flight service attendant positions was initiated and maintained solely by Northwest.

26. From the very commencement of its representation of Northwest's cabin attendants and pursers, TWU regularly sought to remove those restrictions both in its negotiations with Northwest and by resort to administrative agencies.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE

27. From July 1961 to September 1971, Northwest represented to TWU and took the position in negotiations, that occupants of the purser position performed duties involving greater responsibility to Northwest and to Northwest's passengers than did occupants of the cabin attendant position, and that the pay differential between the purser position and the cabin attendant position was therefore properly justifiable. TWU relied upon Northwest's representation and accepted the pay differentials between cabin attendants and pursers as initiated and maintained by Northwest.

WHEREFORE, defendant Transport Workers Union of America, AFL-CIO, demands judgment that the complaint herein be dismissed, and that it have its costs and disbursements in this action.

DATED: New York, N. Y.
May 30, 1975

O'DONNELL & SCHWARTZ

By /s/ ASHER W. SCHWARTZ

Attorneys for Defendant Transport Workers Union of America, AFL-CIO

501 Fifth Avenue
New York, N. Y. 10017
(212) 682-1261

GIANGRECO, SEAY AND MANUEL

110 North Royal Street
P. O. Box 176
Alexandria, Virginia 22313
(703) 548-2555

888 "17th" Street, Northwest
Brawner Building - Suite 306
Washington, D.C. 20006

CERTIFICATION OF MAILING

I hereby certify that a copy of the foregoing was mailed, postage prepaid, to Verner, Liipfert, Bernhard & McPherson, 1660 L Street, Northwest, Suite 1100, Washington, D.C. 20036, Attn: John L. Richardson, Esquire, Cohen, Weiss & Simon, 605 "3rd" Avenue, New York, New York 10016; O'Donoghue & O'Donoghue, 912 Sunderland Place, Northwest, Washington, D.C. 20036, Attn: Donald J. Capuano, Esquire, all on the 29th day of May, 1975.

/s/ A. Andrew Giangreco

Certificate of Mailing also to:
Henry Halladay, Esquire, 2300 First National Bank Building, Minneapolis, Minnesota 55402 and David H. Ranheim, Esquire, 2300 First National Bank Building, Minneapolis, Minnesota 55402.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AIRLINES, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 75-0223
	)	
TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,	)	
	)	
Defendants.	)	

MOTION TO DISMISS

Pursuant to Federal Rule 12 of the Federal Rules of Civil Procedure, defendant Air Line Pilots Association, International, by and through its attorneys, hereby moves this Court to dismiss the above-entitled action on the grounds that the complaint fails to state a claim against defendant Air Line Pilots Association, International upon which relief can be granted and the Court lacks jurisdiction over the subject matter of the complaint.

Respectfully submitted,

By: /s/

COHEN, WEISS and SIMON
605 Third Avenue
New York, New York 10016

O'DONOGHUE & O'DONOGH
1912 Sunderland Place, N.W.
Washington, D.C. 20036

By: /s/

Attorneys for Air Line Pilots
Association, International

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AIRLINES, INC.,	:	Civil Action No. 75-0223
Plaintiff,	:	
v.	:	
TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO, and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,	:	
Defendants.	:	

MOTION TO DISMISS

Pursuant to Rule 12 of the Federal Rules of Civil Procedure, defendant Transport Workers Union of America, AFL-CIO, by its attorneys, O'Donnell & Schwartz, hereby moves this Court to dismiss the above-captioned action on the grounds that the complaint fails to state a claim against defendant Transport Workers Union of America, AFL-CIO, upon which relief can be granted and the Court lacks jurisdiction over the subject matter of the complaint.

Respectfully submitted,

O'DONNELL & SCHWARTZ

By /s/

Attorneys for Transport Workers
Union of America, AFL-CIO
285 Madison Avenue
New York, N. Y. 10017
(212) 532-8900

and

100 Indiana Avenue, N. W.
Washington, D. C. 20001
(202) 347-0860

REFERENCE PAGE

The following opinion and order have been omitted in printing this appendix because they appear in the appendixes to the printed Petition for Certiorari as indicated:

Memorandum opinion of the district court, dated July 7, 1977	Petition for Certiorari Appendix B
Order of the district court granting in part and denying in part the defendants' motion to dismiss, dated July 7, 1977	Petition for Certiorari Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AIRLINES, INC.,	)	
	)	
Plaintiff,	)	
v.	)	Civil Action
	)	No. 75-0223
	)	
TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,	)	
Defendants.	)	

MOTION TO MODIFY COURT'S ORDER FOR PURPOSES OF CERTIFICATION PURSUANT TO 28 U.S.C. §1292(b) AND TO MODIFY COURT'S MEMORANDUM

Defendant Air Line Pilots Association, International, by and through its attorneys, hereby moves this Honorable Court to modify its Order of July 7, 1977 denying defendants' motion to dismiss plaintiff's claim for Title VII contribution by certifying this issue for appeal pursuant to 28 U.S.C. §1292(b), and to modify its Memorandum of July 7, 1977.

Respectfully submitted,

COHEN,
WEISS and SIMON
605 Third Avenue
New York, New York 10016

O'DONOGHUE &
O'DONOGHUE
1912 Sunderland Place, N.W.
Washington, D. C. 20036

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AIRLINES, INC.,

Plaintiff,

vs.

Civil Action No.
75-0223

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Defendants.

CONDITIONAL MOTION OF NORTHWEST AIRLINES, INC. FOR ENTRY OF FINAL JUDGMENT, PURSUANT TO R. 54(b), FED. R. CIV. P.

Plaintiff Northwest Airlines, Inc., hereby moves this Honorable Court to enter final judgment pursuant to R. 54(b) of the Federal Rules of Civil Procedure on its Order dismissing the plaintiff's claim for reimbursement of some portion of its Equal Pay Act-based monetary liability. This motion is conditioned upon this Court certifying as ready for immediate appeal, pursuant to 28 U.S.C. §1292(b), its denial of the unions' motion to dismiss and upon the further condition that the Court of Appeals accepts the unions' interlocutory appeal. If this Court does not grant certification, or if the Court of Appeals declines to hear an interlocutory appeal, Northwest requests that final judgment not be entered under R. 54(b) on the Court's Order

dismissing the Equal Pay Act-based claims.

Dated:

Respectfully submitted,

VERNER, LIIPPFERT, BERNHARD, AND MCPHERSON

By _____
Stuart F. Pierson
Suite 1100
1660 L Street, N.W.
Washington, D.C. 20036
Telephone: (202) 452-7434

DORSEY, WINDHORST, HANNAFORD, WHITNEY & HALLADAY

By _____
Henry Halladay

And _____
Robert Bayer
2400 First National Bank Building
Minneapolis, Minnesota 55402
Telephone: (612) 340-2600

Attorneys for Plaintiff Northwest Airlines, Inc.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AIRLINES, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 75-0223
	)	
TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,	)	
	)	
Defendants.	)	

ORDER

Upon consideration of defendants' motion to modify this Court's Order and Memorandum of July 7, 1977, plaintiff's opposition thereto and conditional motion for entry of final judgment pursuant to Rule 54(b) of the Fed. R. Civ. P., and the memoranda of points and authorities submitted by the parties, it is by the Court this 28th day of July, 1977,

ORDERED that this Court's Memorandum, dated July 7, 1977, be, and hereby is, modified by the deletion of footnote 18 at page 7 and the corresponding renumbering of subsequent footnotes; and it is further

ORDERED that the motion for certification, pursuant to

28 U.S.C. §1292(b), for immediate appeal of the denial of defendants' motion be, and hereby is, granted and that the Court's Order of July 7, 1977, be, and hereby is, modified by the addition of the following paragraph:

> The Court certifies, pursuant to 28 U.S.C. §1292(b), that it is of the opinion that the denial by this Order of defendants' motion to dismiss plaintiff's claim for reimbursement for some portion of its monetary liability arising under Title VII of the Civil Rights Act involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation.

and it is further

ORDERED that if the Court of Appeals chooses to hear the unions' interlocutory appeal, there shall be no just reason for delay and final judgment shall forthwith be entered on the Order of July 7, 1977 dismissing, without prejudice, Northwest's claims for reimbursement from the defendants for some portion of its monetary liability with respect to the Equal Pay Act; and it is further

ORDERED that proceedings in this Court shall not be stayed pending resolution of the interlocutory appeal.

/s/_____

Judge

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-8044 **September Term, 1977**

Air Line Pilots Association, Civil Action #75-0223

v.

Northwest Airlines, Inc.,

Respondent

And consolidated case No. 77-8045

BEFORE: McGowan and Leventhal, Circuit Judges

ORDER

On consideration of the petition for permission to appeal pursuant to 28 U.S.C. §1292(b) and of the responses thereto, it is

ORDERED by the Court that the aforesaid petitions for leave to appeal are granted.

The Clerk of the District Court is requested to certify and transmit the record on appeal at his earliest convenience.

Upon docketing of the appeal, the parties are directed to discuss in their briefs before this Court, *inter alia:*

(1) whether there exists a procedural device or devices by which a respondent in a proceeding before the Equal Employment Opportunity Commission such as

Northwest may obtain the presence of a third party such as the Unions as a co-respondent to the claims of violations of Title VII;

(2) assuming *arguendo* the availability of such a device, whether Northwest's failure to utilize it should bar jurisdiction in federal court under Title VII to decide such claims brought thereunder; and

(3) assuming *arguendo* the existence of a "federal common law of contribution", whether it can serve as a basis for federal subject matter jurisdiction where diversity of citizenship does not exist and where explicit statutory jurisdictional requirements, such as those included in Title VII, have not been met.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST AIRLINES, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 75-0223
	)	
TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,	)	
	)	
Defendants.	)	

ORDER

In *Laffey v. Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C. 1973), *aff'd in relevant part*, 13 F.E.P. Cases 1068 (D.C. Cir. Oct. 20, 1976), plaintiff herein was found to have violated the Equal Pay Act, 29 U.S.C. §206(d)(1) (1970), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a) (1970). Northwest then filed this action on the theory that because of defendants' participation in the collective bargaining agreement underlying the *Laffey* judgment, it is entitled to reimbursement from the defendants for some portion of the monetary judgment issued against it in *Laffey*.

Defendants moved to dismiss, and on July 7, 1977, plaintiff's claim for reimbursement under the Equal Pay Act was dismissed, but in all other respects, defendants' motion was denied. On July 28, 1977, the July 7th Memorandum-Order was modified by adding a certification under 28 U.S.C. §1292(b) concerning the denial of defendants' motion to dismiss plaintiff's claim for reimbursement under Title VII. That modification further stated that if the Court of Appeals should choose to hear defendants' interlocutory appeal, then the Court would enter an order under Rule 54(b) as to the claim under the Equal Pay Act.

Having received notification that the Court of Appeals on January 6, 1978, granted defendants' interlocutory appeal, the Court therefore finds that there is no just reason for delay in entering final judgment on plaintiff's other claim. Accordingly, it is by the Court this 11th day of January, 1978,

ORDERED that final judgment be, and hereby is, entered on the Order of July 7, 1977, dismissing, without prejudice, plaintiff's claim for reimbursement from defendants for some portion of its liability with respect to the Equal Pay Act.

_____

Judge

United States District Court for the District of Columbia

NORTHWEST AIRLINES, INC.

Plaintiff.

vs.

CIVIL NO. 75-0223

Transport Workers Union of America, AFL-CIO and Air Line Pilots Association, International

Defendant.

NOTICE OF APPEAL

Notice is hereby given this 3rd day of February, 1978, that Northwest Airlines, Inc., plaintiff in the above named action, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 11th day of January, 1978, in favor of Transport Workers Union of America, AFL-CIO and Air Line Pilots Association, International against said Northwest Airlines, Inc.

/s/Philip A. Lacovara
HUGHES HUBBARD & REED
1660 L Street, N. W.
Washington, D. C. 20036

Attorney for

Northwest Airlines, Inc.

REFERENCE PAGE

The following opinions, judgments and orders have been omitted in printing this appendix because they appear in the appendixes to the printed Petition for Certiorari as indicated:

Opinion of the court of appeals, dated August 30, 1979	Petition for Certiorari Appendix D
Order of the court of appeals, dated August 30, 1979	Petition for Certiorari Appendix E
Order of the court of appeals, dated October 5, 1979, vacating the order of August 30, 1979	Petition for Certiorari Appendix F
Judgment of the court of appeals, dated October 5, 1979	Petition for Certiorari Appendix G
Order of the court of appeals, denying petition for rehearing, dated October 9, 1979.	Petition for Certiorari Appendix H

Supreme Court of the United States

No. 79-1056

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO, ET AL.

ORDER ALLOWING CERTIORARI. Filed June 16, 1980

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is set for oral argument in tandem with No. 79-972, *Westvaco Corporation* v. *Adams Extract Co.* Mr. Justice Blackmun took no part in the consideration or decision of the motion and petition.

Supreme Court, U.S.
FILED
FEB 4 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1056

NORTHWEST AIRLINES, INC.,

Petitioner,

—against—

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO

—and—

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

BRIEF OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

STEPHEN B. MOLDOF
Of Counsel:
Keith E. Secular
Jay Levy-Warren
COHEN, WEISS and SIMON
605 Third Avenue
New York, New York 10016
Telephone: (212) 682-6077

Attorneys for Respondent
Air Line Pilots Association, International

Printinghouse Press – Bar Ass'n. Steno Serv. (Appeals Section) 212-840-1891

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.....	iii
QUESTIONS PRESENTED.....	1
STATEMENT OF THE CASE.....	2
A. The Absence of Any Timely Claims Against the Unions in Laffey v. Northwest Airlines.....	3
B. Northwest's Belated Attempt to Assert Claims Against the Unions in a Separate Action.....	6
C. The Decision of the Court of Appeals.....	7
REASONS WHY THE WRIT SHOULD NOT BE GRANTED.....	9
I. THE DECISION OF THE COURT OF APPEALS REJECTING NORTHWEST'S CLAIM FOR CONTRIBUTION UNDER THE EQUAL PAY ACT REFLECTS THE UNANIMOUS RULING OF ALL COURTS TO CONSIDER THE ISSUE, IS CLEARLY CORRECT AND DOES NOT MERIT FURTHER REVIEW.....	9
A. The Decision of the Court of Appeals Is Not In Conflict With Any Other Court Decisions.....	9
B. The Court Below Correctly Applied This Court's "Implied Rights" Tests in Rejecting Northwest's Claim.....	13

PAGE

C. The Equal Pay Act Contribution Issue Does Not Merit Further Review.... 16

II. IT IS ENTIRELY PREMATURE TO REVIEW THE TITLE VII CONTRIBUTION AND LACHES ISSUES SINCE NEITHER ISSUE HAS YET BEEN DECIDED BY THE LOWER COURTS..... 17

CONCLUSION..... 23

APPENDIX 1 - Order of District Court, dated July 28, 1977

TABLE OF AUTHORITIES

CASES	PAGE
Brennan v. Emerald Renovators, Inc., 410 F. Supp. 1057 (S.D.N.Y. 1975)	10, 11, 15
Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R. Co., 389 U.S. 327 (1967)	19
Cort v. Ash, 422 U.S. 66 (1975)	7, 14
Denicola v. G.C. Murphy Co., 562 F.2d 880 (3d Cir. 1977)	10, 11, 15
Glus v. G.C. Murphy Co., 562 F.2d 880 (3d Cir. 1977)	20, 21
Hodgson v. Sagner, Inc., 326 F. Supp. 371 (D. Md. 1971), aff'd sub nom. Hodgson v. Baltimore Regional Jt. Board, 462 F.2d 180 (4th Cir. 1972)	10, 11
International Brotherhood of Electrical Workers v. Foust, 99 S. Ct. 2121 (1979)	17
Laffey v. Northwest Airlines, 366 F. Supp. 763 (D.D.C. 1973) and 374 F. Supp. 1382 (D.D.C. 1974), aff'd in part, vacated in part, 567 F.2d 429 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978)	3, 4, 5, 6, 12, 16

PAGE

Marshall v. Eastern Airlines, 474 F. Supp. 364 (S.D. Fla. 1979)..... 11, 12

Marshall v. Tombs Janitorial Service, Inc., 82 Lab. Cas. ¶33,559 (W.D. Mo. 1977).... 10

McCain v. Clearview Dodge Sales, Inc., 574 F.2d 848 (5th Cir. 1978)..... 12

Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977)..... 16, 17

Sinyard v. Foote and Davies Division of McCall Corp., 577 F.2d 943 (5th Cir. 1978)..... 12

Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297 (1943)..... 21

Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242 (1979)..... 14

Tuma v. American Can Co., 367 F. Supp. 1178 (D. N.J. 1973)..... 11

Usery v. Beloit College, 12 Empl. Prac. Dec. ¶11,203 (W.D. Wisc. 1976)..... 10, 15

Weinberger v. Salfi, 422 U.S. 749 (1975)..... 21

PAGE

Wilson P. Abraham Construction Corp. v. Texas Industries, Inc., 604 F.2d 897 (5th Cir. 1979).. 12, 20

Wise v. Lipscomb, 437 U.S. 535 (1978)..... 19

STATUTES

Age Discrimination in Employment Act (29 U.S.C. §621, et seq.)..... 12

Civil Rights Act of 1964, as amended, Title VII (42 U.S.C. §2000e, et seq.) passim

Consumer Credit Protection Act of 1968, as amended (15 U.S.C. §§1601, et seq.)..... 12

Equal Pay Act of 1963 (29 U.S.C. §206(d)..... passim

Fair Labor Standards Act of 1938, as amended (29 U.S.C. §201, et seq.)..... 11, 15

29 U.S.C. §202(a)(3)..... 14
29 U.S.C. §216(a)..... 13
29 U.S.C. §216(b)..... 11, 13
29 U.S.C. §216(c)..... 13
29 U.S.C. §217..... 13

PAGE

Judiciary and Judicial Procedure Act

28 U.S.C. §1292(b)..... 7
28 U.S.C. §1331..... 21

Sherman Act (15 U.S.C. §1, et seq.)..... 12

ADMINISTRATIVE REGULATIONS

29 C.F.R. §800.166(b).... 11
29 C.F.R. §800.166(d).... 11

MISCELLANEOUS

109 Cong. Rec. 9196 (1963)..... 15

109 Cong. Rec. 9208-09 (1963)..... 15

109 Cong. Rec. 9215 (1963)..... 15

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979
No. 79-1056

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

AND

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

BRIEF OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL IN OPPOSITION TO PETITION FOR CERTIORARI

QUESTIONS PRESENTED

1. Whether the Court below correctly concluded, consistent with all other decisions on the issue, that an employer held liable under the Equal Pay Act may not seek contribution from a union for that Equal Pay Act liability.

2. (a) In the absence of any provision in Title VII of the Civil Rights Act of 1964 allowing for contribution, may an employer previously held liable under the Act maintain an independent action against a union for reimbursement for any portion of that Title VII liability where the union has never been named in a charge of discrimination filed with the Equal Employment Opportunity Commission or adjudicated liable under Title VII upon suit by an "aggrieved person"?

(a) If so, is petitioner barred from maintaining such an action because of its excessive, prejudicial delay in asserting any claims against the unions?

STATEMENT OF THE CASE

This case represents an attempt by Northwest Airlines, Inc. ("Northwest" or "Petitioner") to obtain contribution from the Air Line Pilots Association, International ("ALPA") and the Transport Workers Union of America ("TWU"), former collective bargaining representatives for flight attendants employed by Northwest, for Northwest's

financial liability in Laffey v. Northwest Airlines, Inc., 366 F. Supp. 763 (D.D.C. 1973) and 374 F. Supp. 1382 (D.D.C. 1974), aff'd in part and vacated in part, 567 F.2d 429 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978), under two comprehensive, regulatory statutes - The Equal Pay Act of 1963 ("EPA")* and Title VII of the Civil Rights Act of 1964 ("Title VII)** - which do not provide a right to contribution.

A. The Absence of Any Timely Claims Against the Unions in Laffey v. Northwest Airlines

In Laffey, Northwest was held to have engaged in widespread violations of the Equal Pay Act and Title VII against its female flight attendants. Contrary to the implicit suggestion in Petitioner's Statement of the Case, no union conduct of any kind was held in Laffey to violate any

---

* 29 U.S.C. §206(d)(1).

**42 U.S.C. §2000e-2(a).

law.* The sole liability was Northwest's. Indeed, there was not even the suggestion of any alleged union misconduct - even after ALPA had been joined in the case ** - until "almost four years after the action was commenced, more than three years

---

* Northwest's extensive discussion in its "Statement" of alleged union conduct in negotiations is entirely self-serving and inaccurate, and is totally unsupported by the record in this case, which consists solely of the complaint and answers, and the decisions issued by the lower courts. Any response would similarly have to extend beyond the record, and is thus inappropriate at this time.

** Plaintiffs in Laffey "moved to join ALPA as a party 'solely for the limited purpose of assuring that the court will have before it all the parties necessary to effectuate relief'", Laffey v. Northwest, supra, 567 F.2d at 477-78, and did not seek any monetary relief from ALPA "[s]ince they deemed ALPA 'not responsible for any of the discrimination' alleged". Id. at 478. "By letter to the District Court, NWA advised that it had no objection to the employees' motion," id. at 478, and Northwest did not assert any claims against ALPA.

after NWA had answered the complaint, and ---several months after the court rendered its findings and judgment," 567 F.2d at 477, when Northwest belatedly attempted to amend its answer to assert a cross-claim for contribution or indemnity against ALPA. 567 F.2d at 476. As Northwest counsel conceded in argument before the Court of Appeals in the case at bar, this extensive delay was the result of Northwest's purposeful litigation strategy. (Transcript of Argument, pp. 19-21). It is against this factual background - and not because of "procedural reasons"* - that the District Court rejected Northwest's untimely effort to obtain contribution in Laffey. The Court of Appeals affirmed that ruling as within the sound discretion of the trial court, emphasizing Northwest's extreme tardiness and the obvious "hardship on the parties" which would have followed from allowing Northwest to pursue its tardy claims. 567 F.2d at 477-78.

---

* Petition for Certiorari ("Petition"), p. 6.

B. Northwest's Belated Attempt to Assert Claims Against the Unions in a Separate Action

Northwest attempted to cure its long delay in Laffey by filing a separate action for contribution for its liability under the Equal Pay Act and Title VII in Laffey. The District Court granted ALPA's motion to dismiss Northwest's claim for Equal Pay Act contribution, citing what it correctly described as the uniform judicial decisions rejecting any right to contribution, whether express or implied, with respect to Equal Pay liability. (App. B, pp. 4b-7b).*

The Court based its denial of ALPA's motion to dismiss the claim for Title VII contribution solely on the conclusion that the federal common law provides a right to contribution applicable to Title VII liability, "at least under some circumstances." (App. B, p. 18b). The Court

---

* The decisions of the Courts below appear in the Appendix to the Petition, and are cited as "App. ___".

later amended its order to include a certification for interlocutory appeal under 28 U.S.C. §1292(b)*, and the Court of Appeals agreed to consider the appeal.

C. The Decision of the Court of Appeals

1. Equal Pay Act Contribution

The Court of Appeals affirmed the dismissal of Northwest's claim for Equal Pay Act contribution, "because we find such a right inconsistent with both the statute's language and purpose." 606 F.2d at 1353. (App. D, p. 6d). The Court rejected Northwest's claim that a right to contribution should be "implied", after applying the guiding tests found in Cort v. Ash, 422 U.S. 66, 78 (1975). The Court emphasized that its "conclusion is also in accord with a persuasive and well-reasoned line of precedent." 606 F.2d at 1355. (App. D,

* In addition to certifying its Title VII contribution ruling for interlocutory appeal, the Court agreed that it had erred in suggesting that there was diversity jurisdiction over the case, and accordingly amended its decision to eliminate footnote 18 and to renumber all subsequent footnotes. This Order appears at Appendix 1 hereto.

p. 11d). No decisions recognizing a right to Equal Pay Act contribution were cited by the Court or Northwest; none exist.

2. Title VII Contribution

The Court of Appeals found it premature - and perhaps ultimately unnecessary - to consider the claim for Title VII contribution because Northwest's extensive delay in seeking relief might have constituted laches so as to bar its claim. The Court remanded the matter to the District Court to consider the laches issue.* There is no lower Court ruling on the laches issue which Northwest has petitioned the Court to review. In addition, the Court of Appeals has indicated that it will rule in the future, if necessary, on the merits of the Title VII contribution claim if the District Court does not find the action barred by laches:

* Northwest apparently would have this Court determine the factual issue of whether its conduct constituted laches. (Petition, p. 24).

> "If the trial court finds that laches is not a bar, the defendants' appeal may be renewed." 606 F.2d at 1356. (App. D, p.13d).

Nevertheless, Northwest now asks this Court to decide the issue in advance of any ruling by the Court of Appeals on the merits of the questions presented for review.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. THE DECISION OF THE COURT OF APPEALS REJECTING NORTHWEST'S CLAIM FOR CONTRIBUTION UNDER THE EQUAL PAY ACT REFLECTS THE UNANIMOUS RULING OF ALL COURTS TO CONSIDER THE ISSUE, IS CLEARLY CORRECT AND DOES NOT MERIT FURTHER REVIEW

A. The Decision of the Court of Appeals Is Not In Conflict With Any Other Court Decisions

Contrary to Northest's protestations, every court that has considered a claim for Equal Pay Act ("EPA") contribution has agreed with the Court below that employers may not seek contribution or indemnity from labor unions for liability

arising under the Equal Pay Act. Denicola v. G.C. Murphy Co., 562 F.2d 889 (3d Cir. 1977); Usery v. Beloit College, 12 Empl. Prac. Dec. ¶11,203 (W.D. Wisc. 1976); Brennan v. Emerald Renovators, Inc., 410 F. Supp. 1057 (S.D.N.Y. 1975); Marshall v. Tombs Janitorial Service, Inc., 82 Lab. Cas. ¶33,559 (W.D. Mo. 1977).

The decisions cited by Northwest as indicative of a "conflict" are wholly inapposite. Indeed, none of the decisions even address the contribution issue.

Hodgson v. Sagner, Inc., 326 F. Supp. 371 (D. Md. 1971), aff'd sub nom., Hodgson v. Baltimore Regional Jt. Board, 462 F.2d 180 (4th Cir. 1972), did not award any damages to an employer against a union. The decision permitted the Secretary of Labor to recover a monetary penalty from a union in unique circumstances based solely on the outrageous conduct of the union therein where, after the employer had agreed to make whole female employees who had been discriminated against in violation of the EPA, the union insisted on diverting part of that "make whole" pay to other employees who had not been the subject of

discrimination. The Court of Appeals herein concluded that Sagner is "fully distinguishable from the present case and our ruling here is not the least bit inconsistent with that decision." 606 F.2d at 1356 (App. D, p. 11d). No other court has interpreted Sagner as providing employers with a right to contribution against a union. Denicola v. G.C. Murphy, supra, 562 F.2d at 894; Brennan v. Emerald Renovators, supra, 410 F. Supp. at 1062. See also, Tuma v. American Can Co., 367 F. Supp. 1178, 1182 (D.N.J. 1973).*

* The Department of Labor, in spite of its recovery in Sagner, has consistently taken a position against recognition of a right of employer contribution. Copies of Department of Labor briefs in other litigation were presented by ALPA to the Court of Appeals herein. See also Marshall v. Eastern Airlines, 474 F. Supp. 364, 366-67 (S.D. Fla. 1979), wherein the Court noted the Labor Department's opposition to employer contribution under the Age Discrimination in Employment Act, which, like the EPA, is enforced through provisions of the Fair Labor Standards Act. Furthermore, contrary to Northwest's contention (Petition, pp. 10, 13), the Courts have construed Department of Labor regulations as directing that enforcement of the EPA by private parties is only available through suit by employees against their employers under Section 216(b) of the Act. 29 C.F.R. §800.166(b); 29 C.F.R. §800.166(d). Brennan v. Emerald Renovators, supra, 410 F. Supp. at 1060 n.6; Tuma v. American Can Co., supra, 367 F. Supp. at 1181-82.

Nor is any conflict with the ruling below presented by Sinyard v. Foote and Davies Division of McCall Corp., 577 F.2d 943 (5th Cir. 1978) (Petition, p. 15). That decision only speaks to the substantive responsibilities imposed on unions by the EPA and Title VII, and does not consider any issue as to specific monetary remedies available against unions under the EPA - let alone the contribution issue.* Significantly, the Fifth Circuit has consistently refused to recognize a right to contribution for federal statutory liability under statutes which, like the EPA, do not expressly provide for contribution.**

* The same is true of Laffey v. Northwest Airlines, supra. Petitioner misleadingly paraphrases Laffey as recognizing a private claimant's right to assert a claim against a union for liability under the EPA. (Petition, pp. 7-8). Clearly, the Court below did not so construe its prior ruling in Laffey.

**See, e.g. Wilson P. Abraham Construction Corp. v. Texas Industries, Inc., 604 F.2d 897 (5th Cir. 1979) [no contribution for liability arising under the Sherman Act]; McCain v. Clearview Dodge Sales, Inc., 574 F.2d 848 (5th Cir. 1978) [no contribution for liability arising under the Consumer Credit Protection Act]; Marshall v. Eastern Airlines, Inc., 474 F. Supp. 364, 366-67 (S.D. Fla. 1979) [no contribution for liability arising under the Age Discrimination in Employment Act].

B. The Court Below Correctly Applied this Court's "Implied Rights" Tests in Rejecting Northwest's Claim

The EPA itself does not provide for contribution. While the Act subjects all violators - employers and unions alike - to possible criminal penalties and to suits for injunctive relief by the Secretary of Labor, 29 U.S.C. §§216(a) and (c), 217, only employers are subject to any kind of private right of action for damages. 29 U.S.C. §216(b).* Nevertheless, Northwest contends that a right of contribution should be "implied" in its favor, and that the Courts below erred in failing to apply the proper judicial standards. The contention is meritless.

* Section 216(b) provides that private actions to recover damages under the EPA may only be brought "against any employer (including a public agency)...by one or more employees..."

Congress added the phrase "against any employer (including a public agency)" to Section 216(b) in 1974 - eleven years after enacting to EPA - thus confirming that it has never intended to make the Act's private remedies applicable to unions.

The governing standards to determine whether a right should be implied are found in Cort v. Ash, 422 U.S. 66, 78 (1975). The Court of Appeals carefully analyzed Northwest's EPA contribution claim and concluded that it did not satisfy the Cort requirements because implication of a right of EPA contribution would be inconsistent with the comprehensive statutory scheme delineating specific remedies,* and with the EPA's stated purpose that "wage differentials based on sex...[constitute] an unfair method of competition." Equal Pay Act of 1963, Pub.L.No. 88-38, §2(a)(5), 77 Stat. 56; see 29 U.S.C. §202(a)(3)(1976). Other courts have similarly emphasized that this statutory purpose would be impeded by permitting a discriminatory employer to offset its own EPA liability through contribution, since that would restore part of its unfair competitive advantage and injure the competitive positions of employers who

* "Where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 247 (1979).

are in compliance with the statute. Usery v. Beloit College, supra, 12 Empl. Prac. Dec. ¶11,203 at pp. 5535-36; Brennan v. Emerald Renovators, supra, 410 F. Supp. at 1061. The Court of Appeals' focus on the explicit statutory purpose repudiates Northwest's assertion that the Court failed to consider Congressional intent. (Petition, pp. 16-18). As the Third Circuit concluded: "The Act evidences absolutely no Congressional intent to make a union liable either to an employee or to an employer." Denicola v. G.C. Murphy Co., supra, 562 F.2d at 894. Accord, Decision of District Court herein. (App. B, p. 7b).*

* Contrary to Northwest's contention, the legislative history does not support recognition of a right of contribution. The bill eventually passed by Congress in 1963 differed from previous proposals by incorporating the equal pay provisions into the enforcement structure of the Fair Labor Standards Act ("FLSA"). Congress was fully aware that the FLSA, as then written, subjected employers but not unions to private actions for back pay. The debates on enforcement of the EPA contain specific references to private employee suits against employers, but no such references to suits by private parties against unions. See, e.g., 109 Cong. Rec. 9196 (1963) [remarks of Rep. Frelinghuysen]; id. at 9208-09 [remarks of Rep. Goodell]; id. at 9215 [remarks of Rep. May].

C. The Equal Pay Act Contribution Issue Does Not Merit Further Review

Northwest seeks to attribute broad significance to its claim for EPA contribution by asserting that the decision below somehow undermines the statutory protections afforded to employees and impairs the enforceability of the Act. (Petition, pp. 12-15). The contention is facially spurious.

This case does not present the issue of what remedies an employee may have against a union under the EPA. The only EPA issue is whether a discriminatory employer found to have violated the Act can share its liability with a union through contribution. Resolution of that question has no bearing on enforcement of the statute.

Employees are fully protected by the present statutory scheme. As demonstrated by the Laffey case, injured employees for whose "especial" benefit the EPA was enacted, can secure full back pay remedies through suits against employers without the necessity of permitting discriminatory employers - whose conduct is regulated, not protected, by the statute - to offset this liability through contribution. Piper v. Chris-Craft Industries, 430 U.S. 1, 37 (1977). At the

same time, existing law creates a panoply of sanctions against unions - including criminal penalties, injunctive suits by the Secretary of Labor under the EPA, and back pay suits against charged union parties under Title VII - so as to deter unions from fostering discriminatory pay practices.* Clearly, recognition of a right of contribution is not "necessary to effectuate Congress' goals." Piper v. Chris-Craft, supra, 430 U.S. at 26.

II. IT IS ENTIRELY PREMATURE TO REVIEW THE TITLE VII CONTRIBUTION AND LACHES ISSUES SINCE NEITHER ISSUE HAS YET BEEN DECIDED BY THE LOWER COURTS

Petitioner asks this Court to review two questions with respect to its Title VII contribution claim: whether such a claim is viable as a matter of law and, if so, whether laches may bar the claim. The

* Moreover, this Court has only recently held that the "real hardship" which large damage awards may impose on easily depleted union treasuries militates against judicial recognition of implied remedies against unions. International Brotherhood of Electrical Workers v. Foust, 99 S. Ct. 2121, 2126-27 (1979).

Court of Appeals has not ruled on either issue; thus, neither is ripe for review.

The Court of Appeals declined to consider the merits of the Title VII contribution claim. Instead, because of the distinct possibility that Northwest's extensive delay in asserting its claim might require dismissal of the action, the Court remanded the laches question for an initial determination by the District Court. Not only is there no ruling for review,* but the Court of Appeals specifically stated that it would rule on the merits of the Title VII claim if a ruling became necessary: "If the trial court finds that laches is not a bar, the defendants' appeal may be renewed." 606 F.2d at 1356. (App. D, p. 13d).

---

* Indeed, as to the laches question, petitioner offers no ruling to which it objects, but rather seeks review by this Court of the position taken by the EEOC as amicus curiae below in apparent anticipation of the possibility that the District Court might adopt that position on remand. (Petition, pp. 23-25).

The absence of rulings by the Appellate Court, and the Court's remand for factual development of issues related to the questions presented for review, require denial of the Petition as premature. See Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R. Co., 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by the Court.")* Cf. Wise v. Lipscomb, 437 U.S. 535, 549 (1978) (Powell, J. conc.) ("there is no reason for this Court to explore difficult questions concerning §5 of the Voting Rights Act in the absence of consideration by the courts below.") Whether or not the Title VII contribution and laches issues may be appropriate for consideration by this Court at a

* The cases cited by Northwest at p. 19 n.8 of its Petition are clearly distinguishable in that in each case the Court agreed to review questions on which the District Courts and Courts of Appeals had ruled.

future stage in this litigation,* the present petition is entirely premature.

While the absence of a Court of Appeals' ruling on the Title VII issues presented in

---

* The only appellate ruling on the Title VII contribution issues is Glus v. G.C. Murphy Co., 562 F.2d 880 (3d Cir. 1977) which held that a claim for Title VII contribution could not be asserted against a union without prior satisfaction of the jurisdictional charge-filing requirements imposed by Title VII as a pre-condition to assertion of Title VII claims. Rulings by district courts which have preliminarily recognized the possible existence of a right to contribution have all been announced in cases in which an independent basis for Title VII jurisdiction existed. Moreover, the Court of Appeals for the Fifth Circuit, in refusing to recognize a right to contribution for federal antitrust liability, has recently rejected according any weight to these decisions:

> "The cases decided under the Civil Rights Act do not even discuss the rationales for allowing contribution. We decline to discard an established rule of law by relying on cases that offer no reasons." Wilson P. Abraham Construction Corp. v. Texas Industries, Inc., 605 F.2d 897, 903 (5th Cir. 1979).

the Petition is sufficient to demonstrate prematurity, it is also significant that the Court of Appeals did not rule on the threshold question of whether the district court has jurisdiction to determine the union's Title VII liability.* Surely review by the Court is not warranted in advance of a ruling on this issue by the Appellate Court.

---

* Proof of the unions' Title VII liability is an essential element of petitioner's asserted right to contribution. It is uncontested that the jurisdictional prerequisite to establishing Title VII liability on the part of the unions (the filing of charges with the EEOC) has not been satisfied. The District Court nonetheless found jurisdiction under 28 U.S.C. §1331. However, where, as here, the claim is so closely related to a statute which contains a specific jurisdictional requirement, fulfillment of that requirement cannot be avoided by attempting to invoke general §1331 jurisdiction. Weinberger v. Salfi, 422 U.S. 749 (1975); Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297 (1943). The only Court of Appeals decision on point has held that a Title VII contribution claim must be dismissed if the statute's jurisdictional filing requirements have not been satisfied. Glus v. G.C. Murphy Co., supra.

Northwest's Title VII claims do not not mature simply because they have been joined in this Petition with a final lower court ruling on its Equal Pay Act contribution claim. The finality of that ruling is the result of an unfortunate choice of litigation tactics: Northwest asked the District Court to enter a final judgment on the Equal Pay Act issue after the Court certified the Title VII contribution claim for appeal. Absent that strategy, this Court would not be asked to review issues until they have first been decided by the Court of Appeals. As discussed above, the Equal Pay Act contribution issue does not merit Supreme Court rule. Any petition for review of the Title VII issues can, and should, await final determinations by the lower Courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

STEPHEN B. MOLDOF

Of Counsel:

Keith E. Secular
Jay Levy-Warren

COHEN, WEISS and SIMON

Attorneys for Respondent
Air Line Pilots Association, International

APPENDIX 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
JUL 29 1977
JAMES F. DAVEY, CLE

NORTHWEST AIRLINES, INC.,

Plaintiff,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Defendants.

Civil Action
No. 75-0223

ORDER

Upon consideration of defendants' motion to modify this Court's Order and Memorandum of July 7, 1977, plaintiff's opposition thereto and conditional motion for entry of final judgment pursuant to Rule 54(b) of the Fed. R. Civ. P., and the memoranda of points and authorities submitted by the parties, it is by the Court this 28th day of July, 1977,

ORDERED that this Court's Memorandum, dated July 7, 1977, be, and hereby is, modified by the deletion of footnote 18 at page 7 and the corresponding renumbering of subsequent footnotes; and it is further

ORDERED that the motion for certification, pursuant to 28 U.S.C. §1292(b), for immediate appeal of the denial of defendants' motion be, and hereby is, granted and that the Court's Order of July 7, 1977, be, and hereby is, modified by the addition of the following paragraph:

The Court certifies, pursuant to 28 U.S.C. §1292(b), that it is of the opinion that the denial by this Order of defendants' motion to dismiss plaintiff's claim for reimbursement for some portion of its monetary liability arising under Title VII of the Civil Rights Act involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation.

and it is further

ORDERED that if the Court of Appeals chooses to hear the unions' interlocutory appeal, there shall be no just reason for delay and final judgment shall forthwith be entered on the Order of July 7, 1977 dismissing, without prejudice, Northwest's claims for reimbursement from the defendants for some portion of its monetary liability with respect to the Equal Pay Act; and it is further

ORDERED that proceedings in this Court shall not be stayed pending resolution of the interlocutory appeal.

Judge

Supreme Court, U.S.
FILED
FEB 12 1980
MICHAEL RODAK, JR., CLERK

No. 79-1056

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

AND

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

PHILIP A. LACOVARA
JAY KELLY WRIGHT
WILLIAM R. STEIN
Hughes Hubbard & Reed
1660 L Street, N.W.
Washington, D.C. 20036

Attorneys for Petitioner Northwest Airlines, Inc.

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... *i*

INTRODUCTION 2

I. THE DECISION BELOW INSULATES UNIONS FROM LIABILITY FOR EQUAL PAY ACT VIOLATIONS AND MERITS REVIEW BY THIS COURT 4

II. THE TITLE VII ISSUES ARE RIPE FOR REVIEW BY THIS COURT 9

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Abraham Construction Corp. v. Texas Industries, Inc., 604 F.2d 897 (5th Cir. 1979) 5

Beal v. Missouri Pacific Railroad Corp., 312 U.S. 45 (1941) 2

Bethel v. Jefferson, 589 F.2d 631 (D.C. Cir. 1978) 11

Cannon v. University of Chicago, No. 77-926 (U.S. May 14, 1979) (47 U.S.L.W. 4549) 7

Carbon Fuel Company v. United Mine Workers, No. 78-1183 (U.S. December 10, 1979) (48 U.S. L.W. 4059) 7

Gillespie v. United States Steel Corp., 379 U.S. 148 (1964) 10

Hodgson v. Sagner, Inc., 462 F.2d 180 (4th Cir. 1972), *affirming* 326 F. Supp. 371 (D. Md. 1971) 5

In re Corrugated Container Antitrust Litagation, No. 79-2439 (5th Cir. filed October 30, 1979), *petition for cert. filed sub nom. Westvaco Corp. v. Adams Extract Co.*, No. 79–972 (U.S. December 21, 1979) (48 U.S.L.W. 3437) 5

International Brotherhood of Electrical Workers v. Foust, No. 78-38 (U.S. May 29, 1979) (47 U.S.L.W. 4600) 6,7

Laffey v. Northwest Airlines, Inc., 366 F. Supp. 763 (D.D.C. 1973) 2,3,6

Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 437 U.S. 1086 (1978) 3,6,11

Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979) 5

Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192 (1944) 7

Transamerica Mortgage Advisers, Inc. v. Lewis, No. 77-1645 (U.S. November 13, 1979) (48 U.S. L.W. 4001) 2

United States v. General Motors Corp., 323 U.S. 373 (1945) 10

Vaca v. Sipes, 386 U.S. 171 (1967) 7

Statutes

Judiciary and Judicial Procedure Act
28 U.S.C. §1254(1) 9
28 U.S.C. §1292(b) 3,9,10

Equal Pay Act of 1963
29 U.S.C. §206(d)(2) ..... *passim*

Labor-Management Reporting and Disclosure Act
29 U.S.C. §431(b) 7

Title VII of Civil Rights Act of 1964
42 U.S.C. §§2000e *et seq.* ..... *passim*

Rules

Fed. R. Civ. P. 54(b) 10

Miscellaneous

109 Cong. Rec. 9209 (1963) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1056

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,
AND
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

Petitioner Northwest Airlines, Inc., submits this reply brief in support of its petition for a writ of certiorari.

INTRODUCTION

In its effort to discourage this Court from granting certiorari, ALPA suggests that the record is cloudy, that the Equal Pay Act issue involves no conflict, and that the Title VII issues are premature. These efforts to shield the unions from a share of the liability that they helped to create should not succeed.

First, although the case arises on pretrial motions, Northwest's statement of its factual context fairly portrays what has occurred. The statement rests upon the allegations of the complaint, which must be assumed as true for purposes of the unions' motion to dismiss. *Transamerica Mortgage Advisers, Inc. v. Lewis*, No. 77-1645 (U.S. November 13, 1979) (48 U.S.L.W. 4001); *Beal v. Missouri Pacific Railroad Corp.*, 312 U.S. 45 (1941). In addition, the statement draws upon the extensive findings of fact in the *Laffey* litigation, out of which this case grows and in which ALPA itself was a party. *See Laffey v. Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C. 1973). In assessing the appropriateness of reviewing the legal issues framed by the petition, the Court should be aware that the factual basis of Northwest's claim for contribution is neither weak nor speculative.

Second, ALPA is flatly wrong in insisting that the cases are in accord in immunizing unions from Equal Pay Act liability. There is confusion among the circuits about the existence of this predicate for an employer's claim for contribution. ALPA makes little effort to contest the importance of the issue.

Third, ALPA tries to sidestep the Title VII issues with a cry of prematurity. The cry has a hollow ring

in light of the unions' own successful effort to obtain an interlocutory appeal on the issue under 28 U.S.C. §1292(b). That appeal rested on the trial judge's certification of a controlling legal issue the immediate resolution of which would materially advance the ultimate termination of the litigation. (Br. in Opp. App. 1b). It is also hard to credit a claim of "prematurity" in a case that has been pending for five years.

ALPA implies in its Brief in Opposition (at 5) that Northwest harbored some untoward litigation strategy when it did not claim contribution of the outset of the *Laffey* litigation. To the contrary, however, Northwest merely relied on the factors described at pp. 24-25 of the petition in concluding that it was both unnecessary and undesirable to complicate the *Laffey* case by asserting contingent cross- or third-party claims for contribution prior to trial.

Contrary to ALPA's further implication, the ruling by the court of appeals in *Laffey* that the possible "hardship on the parties" (567 F.2d at 477-78) justified the denial of post-trial leave to assert these claims cast no cloud over the filing of a separate action. The court was enforcing the protection afforded to the existing parties there—the plaintiff employees—by the rules governing third-party practice. There was no hint that a separate suit directly against the unions would be objectionable.

I.

THE DECISION BELOW INSULATES UNIONS FROM LIABILITY FOR EQUAL PAY ACT VIOLATIONS AND MERITS REVIEW BY THIS COURT.

In an effort to hide the significance of the decision below, ALPA tries to suggest that it raises no threat to enforcement of the Equal Pay Act. Asserting that only the interests of "discriminatory employers" are at stake, ALPA insists that the case does not pose the question of union liability to employees. (Br. in Opp. 16). Without downgrading the independent significance of the rights of employers induced to agree to discriminatory wage scales, it is important to recognize that the decision below does directly threaten employees' rights under the Equal Pay Act.

While the court purported not to decide "definitely" whether an employee has the right to sue his or her union (Pet. App. 10d), the court expressly termed "remote" the possibility that it would acknowledge this right (*id.*). Moreover, the court bluntly stated that the "omission [of an express remedy against unions in the Equal Pay Act] insulates unions from suits by employees." (Pet. App. 9d). This unmistakable grant of immunity to discriminatory unions, allowing unions to escape any financial responsibility for the discrimination they cause, was the premise for the court's holding that

an employer has no right to contribution from a union.[1]

ALPA argues that allowing an employer to obtain contribution against a union would weaken enforcement of the Equal Pay Act against employers. (Br. in Opp. 14-15). But that argument proves too much, for it would justify barring even the EEOC (as successor to the Secretary of Labor) from joining unions in backpay actions brought on behalf of injured employees. ALPA's argument, like the decision below, is necessarily a challenge to the authority even of the EEOC to bring backpay suits against unions for Equal Pay Act violations. Previously, however, that authority was not in doubt. *See Hodgson v. Sagner, Inc.*, 462 F.2d 180 (4th Cir. 1972), *affirming* 326 F. Supp. 371 (D. Md. 1971). Of course, the decision below is even more hostile to backpay claims made directly by the injured employees.

Despite ALPA's wishful thinking on this issue, there

[1] In other areas of the law, other courts have used a different mode of analysis to decide whether, as a policy matter, contribution should be allowed even when the object of the contribution claim unquestionably would have had direct liability to the original plaintiff if sued by him. *Compare, e.g., Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979) (recognizing contribution for antitrust liability), *with Abraham Construction Corp. v. Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979) (denying contribution); *In re Corrugated Container Antitrust Litigation*, No. 79-2439 (5th Cir. filed Oct. 30, 1979) (unpublished *per curiam*) (denying contribution), *petition for cert. filed sub nom. Westvaco Corp. v. Adams Extract Co.*, No. 79-972 (U.S. Dec. 21, 1979) (48 U.S.L.W. 3437).

ALPA only cites the cases denying contribution (Br. in Opp. 12, 20) without acknowledging this conflict.

is an explicit and admitted conflict among the Third, Fourth, Fifth, and District of Columbia Circuits about union liability for backpay under the Equal Pay Act. *See* cases discussed at Pet. 15-16. Since this case squarely poses this important issue, this is an excellent occasion to eliminate the confusion.

Citing this Court's recent decision in *International Brotherhood of Electrical Workers v. Foust*, No. 78-38 (U.S. May 29, 1979) (47 U.S.L.W. 4600), ALPA argues that this Court should deny review so as to protect "union treasuries." (Br. in Opp. 17). But as four members of this Court observed, concurring in the result in *Foust*, the proper concern is not with a union's "fiscal soundness" but only with not forcing it to "pay money for something that was not [its] fault." 47 U.S.L.W. at 4604 (Blackmun, J., joined by Burger, C. J., Rehnquist and Stevens, JJ.).

Indeed, the Court in *Foust* recognized the appropriateness of holding unions liable for compensatory damages; the Court declined only to find implicit authority for punitive damages. In this case, Northwest contends that the unions caused it to enter into contracts that were later determined in the *Laffey* litigation to violate the Equal Pay Act—a clear violation of the unions' statutory duty not to cause employers to commit violations of the Equal Pay Act. *See* 29 U.S.C. §206(d)(2). If ultimately found to have violated this prohibition in the Equal Pay Act and to be subject to a claim for contribution, the unions will pay only their fair share of Equal Pay Act damages caused by their

conduct. This result is fully consistent with *Foust.*[2]

Although the Equal Pay Act does not expressly create a private cause of action against a union that causes employers to violate the Equal Pay Act, thereby injuring both employers and employees, that silence alone is not dispositive. This Court has repeatedly reaffirmed its willingness to recognize implied remedies against unions that violate statutory duties under the federal labor laws. *E.g., Carbon Fuel Company v. United Mine Workers*, No. 78-1183 (U.S. December 10, 1979) (48 U.S.L.W. 4059, 4060 n.5); *International Brotherhood of Electrical Workers v. Foust, supra; Vaca v. Sipes*, 386 U.S. 171 (1967); *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944). No less than unions that breach the duty of fair representation or violate arbitration obligations, unions that cause employers to violate the Equal Pay Act do violence to important federal policies. The failure of Congress to provide an express remedy is attributable to understandable oversight, as explained in Northwest's petition (Pet. 9-11, 17-18), and not to conscious choice. *Compare Cannon v. University of Chicago*, No. 77-926 (U.S. May 14, 1979) (47 U.S.L.W. 4549).

While ALPA boldly insists that there is no legislative

---

[2] Since ALPA has raised a vague specter of depletion of its treasury (Br. in Opp. 17), it is pertinent to observe that ALPA's resources are substantial. ALPA's Annual Report for 1978, filed with the Secretary of Labor pursuant to Section 201(b) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §431(b), shows that its assets on December 31, 1978, exceeded $24 million, and that it collected nearly $20 million in dues and nearly $22 million from the sale of investments. (Form LM-2, Statement A, item 31; Schedule 7, item 1).

history to support private suits under the Equal Pay Act against discriminating unions (Br. In Opp. 15 n*), that assertion cannot dispel the force of the unambiguous congressional statements quoted in the petition (at 17-18 nn.6 & 7). Those statements show that Congress understood that both employees and employers could bring private suits against unions and that unions would be "subject to *all the penalties and all the enforcement provisions* provided under the Fair Labor Standards Act." 109 Cong. Rec. 9209 (1963) (emphasis added).[3]

ALPA does not deny that the question of union liability for Equal Pay Act violations is one of great importance to employers, to employees and to unions. The issue merits this Court's attention. In view of the recent transfer of responsibility for public enforcement of the Equal Pay Act from the Secretary of Labor to the EEOC, this is an especially appropriate occasion for this Court to address it.[4]

---

[3] ALPA observes irrelevantly that the Equal Pay Act as passed differed from the legislation originally proposed, but the colloquys quoted in the petition concern the language that was actually enacted into law.

[4] ALPA chooses to characterize for this Court the position of the Department of Labor on the contribution issue, relying on extracts from some lower court briefs (Br. in Opp. 11 n*).

If the Court wishes to be advised of the current authoritative position of the government, especially now that enforcement responsibility has been transferred to the EEOC, the proper course would be to invite the Solicitor General to file a brief expressing those views.

II.

THE TITLE VII ISSUES ARE RIPE FOR REVIEW BY THIS COURT.

ALPA argues that the Title VII issues are "premature" and "not ripe for review" because the court of appeals remanded the case to the district court. (Br. in Opp. 19-20). In making the prematurity argument, however, ALPA ignores the fact that it was the unions themselves that originally sought interlocutory review of the Title VII contribution question in the court of appeals, after the district judge had upheld this claim against them. At that time the unions recognized—as did the district court in granting a §1292(b) certification and as did the court of appeals in accepting the certificate—that it made no sense to try a complex employment discrimination case before a definitive determination whether the Title VII claim could be asserted at all. Although ALPA now finds it expedient to abandon the arguments that the unions made below, those arguments remain valid.

ALPA's suggestion that there is "no ruling for review" (Br. in Opp. 18) is absurd. That limited view of this Court's jurisdiction is unwarranted. While it is true that the court of appeals declined to decide the existence of a Title VII contribution claim, it is equally true that it had jurisdiction over this issue under §1292(b) and that this Court correspondingly has jurisdiction to decide it under 28 U.S.C. §1254(1). This Court may review any "cert worthy" issue in this case,

even though the court of appeals has sought to duck it.[5]

The exercise of this power is especially appropriate here. As Northwest noted in its petition (at 19), the Title VII issues merit review even apart from the Equal Pay Act issue because Title VII has a broader reach. But if this Court decides to hear the Equal Pay Act question, which is certainly ripe for review, it makes good sense to hear the analagous Title VII questions as well. In deciding the contribution question under the Equal Pay Act, this Court should consider the interplay between that Act and Title VII. The issue whether there can be contribution under either related Act should not be considered in a vacuum. Since the Equal Pay Act ruling is the subject of a Rule 54(b) final judgment, this may be the only opportunity the Court will have to consider the contribution issues under both that Act and Title VII.[6]

---

[5] *See, e.g., United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945), where the Court granted certiorari in a "case not yet fully tried" and the issues that the court of appeals had remanded for trial were "fundamental to the further conduct of the case." *See also Gillespie v. United States Steel Corp.*, 379 U.S. 148, 154 (1964).

[6] ALPA asserts (Br. in Opp. 22) that this procedural posture is the "result of an unfortunate choice of litigation tactics" by Northwest, its request for entry of a Rule 54(b) judgment on the Equal Pay Act ruling. This amazing statement turns the facts on their head.

In fact, Northwest's request for Rule 54(b) certification came only after the unions sought permission for a §1292(b) interlocutory appeal on the Title VII claim. Both Northwest's request and the entry of a Rule 54(b) final judgment on the Equal Pay Act claim were contingent upon the acceptance of the Title VII appeal by the court of appeals. *See* Br. in Opp. App. 1b. Northwest, then as now, acted in the interest of judicial economy and in a desire to avoid fragmenting this litigation.

Moreover, the "laches" issue in this case is not, as ALPA contends, a "factual" question in need of evidentiary development by the district court before capturing this Court's attention. Rather, the issue that deserves to be addressed now is whether, as a matter of law, a Title VII contribution claim may be barred as untimely even though it is asserted before the judgment is paid (the time at which a contribution claim arises at common law).[7]

In sum, the questions concerning the availability of claims for contribution under Title VII are important. They are pure questions of law that are suitably presented by this record. For reasons of judicial economy and authoritative guidance, they should be decided by this Court now.

---

[7]As a final strategy, ALPA attempts to attribute some significance to the fact that the court of appeals did not decide the "threshold question of whether the district court has jurisdiction to determine the union's Title VII liability." (Br. in Opp. 21). This "jurisdictional" observation is both misleading and irrelevant.

ALPA neglects to mention that the District of Columbia Circuit has repeatedly held that the EEOC charge-filing requirement on which ALPA relies is not a jurisdictional prerequisite to a Title VII claim. *E.g., Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 467-69 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978); *Bethel v. Jefferson*, 589 F.2d 631, 641-42 (D.C. Cir. 1978). Moreover, ALPA's comment is merely another way of describing the issue that this Court is being asked to decide on the merits; the observation has no relevance to the question whether the Title VII contribution issue is ripe for review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PHILIP A. LACOVARA
JAY KELLY WRIGHT
WILLIAM R. STEIN
Hughes Hubbard & Reed
Attorneys for Petitioner
Northwest Airlines, Inc.

February 1980.

FILED
JUN 3 1980
MICHAEL RODAK, JR., CLERK

No. 79-1056

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,
AND
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

PHILIP A. LACOVARA
JAY KELLY WRIGHT
WILLIAM R. STEIN
Hughes Hubbard & Reed
1660 L Street, N.W.
Washington, D.C. 20036

Attorneys for Petitioner
Northwest Airlines, Inc.

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
INTRODUCTION 2
A. Contribution Under the Equal Pay Act 3
B. Contribution Under Title VII 7
CONCLUSION 9

TABLE OF AUTHORITIES

Page

Cases:

Corning Glass Works v. Brennan,
417 U.S. 188 (1974) 6

Hodgson v. Baltimore Regional Joint Board,
462 F.2d 180 (4th Cir. 1972), *affirming* 326 F. Supp. 371 (D. Md. 1971) 4

Sinyard v. Foote and Davies Division of McCall Corp.,
577 F.2d 943 (5th Cir. 1978) 5

Touche Ross & Co. v. Redington,
442 U.S. 560 (1979) 7

Westvaco Corp. v. Adams Extract Co.,
No. 79-972 (U.S., petition for a writ of certiorari filed December 21, 1979) 2,3,8

Statutes:

Equal Pay Act of 1963
29 U.S.C. §206(d) ..... *Passim*

Title VII of Civil Rights Act of 1964
42 U.S.C. §§2000e *et seq* ..... *Passim*
Section 703(c)(3), 42 U.S.C. §2000e-2(c)(3) 5
Section 706(g), 42 U.S.C. §2000e-5(g) 5

Miscellaneous:

Note, *Contribution in Private Antitrust Actions,*
93 Harv. L. Rev. 1540 (1980) 3

Restatement (Second) of Torts §886A (1979) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1056

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

AND

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner Northwest Airlines, Inc., submits this supplemental brief to respond to the brief submitted by the Solicitor General as *amicus curiae.* The Solicitor General's brief demonstrates why certiorari should be granted in this case.

INTRODUCTION

In the three and one-half months since the Court invited the submission of an *amicus* brief, the government has been unable to determine a firm position on the legal issues raised by the petition. Indeed, the Solicitor General repeatedly emphasizes the difficulty of the issues. Thus, even the government is in need of authoritative resolution of these important issues that directly affect the government's administration of the Equal Pay Act and the Civil Rights Act of 1964. As explained in Northwest's petition and in the *amicus* brief for the Chamber of Commerce of the United States, employers, unions and employees throughout the country should not be left indefinitely in a legal limbo, such as the one in which even the government finds itself.

The Solicitor General's suggestion that the Court grant certiorari in an antitrust case raising a contribution issue, *Westvaco Corp.* v. *Adams Extract Co.*, No. 79-972, while holding this petition in abeyance, is hardly a useful approach. The legal and policy questions raised by the issue of contribution under the federal employment discrimination statutes are distinctly different from those raised by the contribution issue under the antitrust laws. There is no reason to believe that the Court's consideration of *Westvaco* alone would help determine whether contribution should be permitted in favor of employers against unions under the Equal Pay Act or Title VII. The issues in this case warrant independent treatment.

In urging the grant of certiorari in *Westvaco,* the Solicitor General notes:

> "[t]he question presented is substantial. The threshold issue is whether, and the extent to which, the federal courts in exercising their federal common-law powers

have the authority to create a private right of action for contribution under the antitrust laws." *Westvaco Corp.* v. *Adams Extract Co., supra,* Br. for U.S. at 9.

Whether federal courts should assert this authority under the employment discrimination laws is neither less substantial nor less important.

Perhaps the most effective course would be to grant certiorari in both cases and to set the cases for argument in tandem. That approach would provide the Court with an opportunity to take a comprehensive look at the question of implying a right of contribution under diverse federal statutes. The new Restatement of Torts now provides, as a comprehensive principle of tort law, that there is a general right of contribution among joint tortfeasors even where a judgment has not been rendered against all of them. *See Restatement (Second) of Torts* §886A (1979). Tandem consideration of both cases would enable the Court to decide how far to apply this doctrine in the enforcement of federal statutory claims.*

A. Contribution Under the Equal Pay Act

The Solicitor General recognizes that the legislative history of the Equal Pay Act provides powerful support for Northwest's argument that, contrary to the holding below, Congress intended to treat unions and employers equally under the Act and to make unions bear independent financial liability for violating the Act's prohibitions against inducing discriminatory wage levels. Without taking a definite po-

See generally Note, *Contribution in Private Antitrust Actions,* 93 Harv. L. Rev. 1540 (1980), concluding that contribution should be permitted in antitrust cases.

sition on this issue, however, the Solicitor General suggests that union financial liability may nevertheless be unwarranted. The Solicitor General reasons that recovery under the Act constitutes, in essence, a return of unpaid wages and that, therefore, even though a union may violate the Act, only an employer should be responsible for paying the illegally withheld wages. There are three fundamental flaws with this suggestion that repeated statements of Congressional intent should be frustrated.

1.

The Solicitor General's analysis would prove too much and would require the government to disavow the position that it has already convinced lower courts to accept. The apparent inference flowing from the government's argument would be that only employers — but never unions — are responsible for restoring wages that have been withheld as a result of discriminatory wage scales. The government itself, however, has previously asserted that it, at least, may sue unions under the Equal Pay Act and force them in appropriate circumstances to pay back wages that they caused an employer to deny on grounds of sex.

The financial liability of unions in that type of suit was expressly upheld, for example, by the Fourth Circuit in *Hodgson* v. *Baltimore Regional Joint Board,* 462 F.2d 180 (1972), *affirming* 326 F. Supp. 371 (D. Md. 1971). Indeed, the court below in this case explicitly and repeatedly agreed that the government may enforce financial liability against unions in suits that it brings against them under the Equal Pay Act. *See* Pet. App. 7d, 9d, 11d.

Presumably, therefore, "recovery of unpaid wages" is not

inherently inconsistent with union liability. The real issue before this Court is whether unions may be required to shoulder a fair share of back pay liability arising out of suits brought directly by the affected employees, as Congress intended, as Northwest urges and as the Fifth Circuit agreed in *Sinyard* v. *Foote and Davies Division of McCall Corp.*, 577 F.2d 943, 945 (1978). The government's analysis does not advance that inquiry.

2.

The Court should be skeptical of the government's effort to characterize the financial relief available under the Equal Pay Act as restitutionary rather than compensatory. In any event, labels should not control the determination of the parties who may be liable for the relief. Congress has made unions expressly liable for "back pay" when they cause employers to pay sexually discriminatory wages and when the claim is pressed under Title VII. *See* 42 U.S.C. § §2000e-2(c)(3), 2000e-5(g). There is no reason to assume that Congress intended to exempt unions from financial liability for the sex discrimination that they cause when the claim is brought under the Equal Pay Act. Indeed, the legislative history of the Act indicates precisely the opposite.

The focus of the Equal Pay Act is the same as that of Title VII, even though the Act applies in a narrower class of employment discrimination cases — only those based on sex and taking the form of disparate wages. While the Solicitor General suggests that the Equal Pay Act is specially concerned with the unfair economic advantage that employers may achieve by paying women lower wages, any effort to draw this distinction between the statutes is illusory.

Like Title VII, the Equal Pay Act is designed to afford relief from employment discrimination. As this Court explained unambiguously in *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 195 (1974):

> "Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry. . . ."

In adopting the Act, Congress pointedly recognized that unions may cause wage discrimination; such union conduct is separately pronounced illegal. *See* 28 U.S.C. §206(d)(2). Since the Congressional focus was on protecting women workers from discrimination by employers *or by unions* or by both, there is no basis in the structure, purpose, or terms of the Act to infer that Congress was assigning exclusively to employers the liability for illegally denied compensation.

3.

The Solicitor General also errs in suggesting that, despite expressions of Congressional intent, unions should perhaps be exempted from financial liability for violating §206(d)(2) because they do not benefit from wage discrimination. Underlying the Congressional decision to outlaw union efforts to cause wage discrimination, however, is the recognition that unions do have a direct financial incentive to induce or to ratify wage discrimination. A union may profit in at least two ways from securing a wage scale that discriminates against women.

First, when the union is dominated or controlled by men, as often happens, a discriminatory division of the total wage package will benefit the male control group, even though the

employer reaps no economic advantage at all. Second, when illegally low wages for women at a company provide the employer with a competitive advantage, the union may share in the illegal gain. Artificially lower wage costs are likely to result in increased demand for that employer's goods and services, thus protecting or increasing employment levels. Either result assures the union of *per capita* dues that it would not accure in the absence of the discriminatory wage levels.

As §206(d)(2) shows, Congress understood that unions do cause sex discrimination in wages and that they often do so because of a direct financial motive. Congress thus recognized the pragmatic predicate for union liability that the Solicitor General seems to ignore. The Solicitor General's speculative analysis, in short, does not justify adoption of a rule of law that automatically immunizes unions from a *pro rata* share of Equal Pay Act liability. As this Court recently observed in *Touche Ross & Co.* v. *Redington,* 442 U.S. 560, 578 (1979): "The ultimate question is one of Congressional intent, not one of whether this Court" — or the Solicitor General — "thinks that it can improve upon the statutory scheme that Congress enacted into law."

B. Contribution Under Title VII

The Solicitor General's brief is equally tentative about contribution under Title VII. The Solicitor General does not deny that most federal courts have agreed that an employer has a right of contribution that may be asserted to apportion liability under Title VII. *See* Pet. 21. His brief conspicuously does not embrace the EEOC's contention in the court below that the employer's right to contribution is forfeited unless he impleads the union at the outset of the employees' suit. As

the *amicus curiae* brief of the Chamber of Commerce of the United States explains (at 7-10), the EEOC's position below — which received some credence from the Court of Appeals' disposition — has created considerable confusion about the proper conduct of Title VII litigation.

On the merits, the court below termed the Title VII contribution issue a "complex and sensitive question" (Pet. App. 12d), even though most federal courts have recognized a right of contribution under Title VII, as had the district court in this case. The District of Columbia Circuit thus has expressed reservations that other circuits do not share. The Solicitor General nevertheless suggests deferral of the Title VII issue that is framed by this case. Deferral, however, is unwarranted.

As the Solicitor General points out in his brief in the *Westvaco* case (at 16), postponement of review of the antitrust contribution issue in that case would result in a "considerable expenditure of judicial resources and forum shopping without a commensurate increase in elucidation of the issues." Thus, he continued, "staying review for a more propitious case would be a costly procedure for both the judiciary and litigants." The situation is precisely the same here. The assertion of the EEOC's novel timeliness argument in the court below and the court's own reservations about the merits have injected doubt about the existence and enforcement of contribution under Title VII. A great deal of confusion and uncertainty — with the concomitant increase in the expenditure of judicial and litigant resources, as well as forum shopping — will undoubtedly ensue.

In sum, whatever position the government may finally elect to take on the merits, the Court now has the opportunity to settle an important issue of vast practical importance to employers, employees, unions, and trial

courts throughout the country. Moreover, as the government stated in *Westvaco* (at 16 n.17) — and it is equally true here — "[a]n authoritative resolution of the issues by this Court would thus save judicial resources, foster the uniformity desired on a question of federal law, and avoid forum shopping."

CONCLUSION

The petition for a writ of certiorari should be granted. The Court should consider setting the case for argument in tandem with the *Westvaco* case, No. 79-972, if certiorari is granted in that case.

Respectfully submitted,

PHILIP A. LACOVARA
JAY KELLY WRIGHT
WILLIAM R. STEIN
Hughes Hubbard & Reed
Attorneys for Petitioner
Northwest Airlines, Inc.

June 1980.

Supreme Court, U.S.
FILED
APR 14 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-1056

NORTHWEST AIRLINES, INC.,

Petitioner,

– against –

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO

– and –

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents,

OPPOSITION OF RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL TO MOTION OF CHAMBER OF COMMERCE TO FILE A BRIEF AMICUS CURIAE

STEPHEN B. MOLDOF
Of Counsel:
Keith E. Secular
Jay Levy-Warren
COHEN, WEISS and SIMON
605 Third Avenue
New York, New York 10016
Telephone: (212) 682-6077

Attorneys for Respondent Air Line Pilots Association, International

Printinghouse Press – Bar Ass'n Steno Serv. (Appeals Section) 212-687-0384

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 79-1056

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

and

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

OPPOSITION OF RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL TO MOTION OF CHAMBER OF COMMERCE TO FILE A BRIEF AMICUS CURIAE

Respondent Air Line Pilots Association, International objects to the motion for leave to file a brief amicus curiae by

the Chamber of Commerce because it is out of time and urges that it be denied.

Rule 42.1. of this Court provides that "A brief of an amicus curiae prior to consideration *** of the petition for writ of certiorari *** or a motion for leave to file when consent is refused, may be filed only when submitted within a reasonable time prior to the consideration *** of the petition for a writ of certiorari. Such motions are not favored".

The petition for certiorari herein was filed on January 4, 1980, and the brief in opposition was filed on February 4, 1980. The petition appears to have been considered by the Court in its conference of February 22, 1980, since on the following Monday, February 25, the Court issued an order inviting the Solicitor General to file a brief expressing the views of the United States. The Chamber's

motion to file a brief amicus curiae was filed on April 4, 1980.

We submit that the Court's order was not intended to reopen the time for filing a motion for leave to file a brief amicus curiae by private parties, thereby transmuting an invitation to the Solicitor General into an invitation to the whole world to file "disfavored" motions to appear as amicus. This Court frequently requests the views of the Solicitor General concerning petitions for certiorari and statements of jurisdiction; it does so, we presume, because it believes that the United States may be able to provide valuable information regarding the merits or importance of the federal questions sought to be raised. It is not implicit in such an order that the Court wishes to hear from others who lack the particular perspective

of the Solicitor General, and who have slept on their rights by not seeking leave to file a brief before the petition for certiorari was originally considered.

While the foregoing is sufficient to support our opposition, the motion should also be denied because of the potential prejudice to respondent resulting from the Chamber's tardy action. Had the Chamber submitted a timely brief amicus curiae, our response could have been included in the brief in opposition to the petition. Respondent should not be burdened with submission of an additional brief at this time to a belated brief amicus curiae.

For the foregoing reasons, the motion of the Chamber of Commerce for leave

to file a brief amicus curiae should be denied.

Respectfully submitted,

STEPHEN B. MOLDOF

Of Counsel:

Keith E. Secular
Jay Levy-Warren

COHEN, WEISS and SIMON

Attorneys for Respondent
Air Line Pilots Association,
International

Supreme Court, U. S.
FILED
JUN 9 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. 79-1056

NORTHWEST AIRLINES, INC.,

Petitioner,

-against-

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO

-and-

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents,

SUPPLEMENTAL BRIEF OF RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL IN OPPOSITION

STEPHEN B. MOLDOF
Of Counsel:

Keith E. Secular
Jay Levy-Warren

COHEN, WEISS and SIMON
605 Third Avenue
New York New York 10016
Telephone: (212) 682-6077

Attorneys for Respondent
Air Line Pilots Association,
International

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 79-1056

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

and

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL IN OPPOSITION

Respondent Air Line Pilots Association, International, submits this supplemental brief in response to the brief submitted by the Solicitor General as amicus curiae.

We agree with the Solicitor General that certiorari should not be granted in this case, and that consideration of Petitioner's claim for contribution for liability under Title VII is premature since the lower Courts have not ruled on the pertinent issues. However, we disagree with the Solicitor General's suggestion that the Petition herein with regard to the issue of Equal Pay Act contribution be held in abeyance pending this Court's decision in Westvaco Corp. v. Adams Extract Co., No. 79-972, an antitrust case, in the event certiorari is granted in Westvaco.

There is a critical, overriding distinction between the state of the law on antitrust contribution and Equal Pay Act contribution which is highly pertinent to consideration of the appropriateness of

review at this time by the Court. As the Solicitor General points out in its brief in Westvaco, there is a split in the Circuits on whether a right to contribution exists, under any circumstances, for antitrust liability. In contrast, there is no split in the Circuits on whether a right to contribution exists for Equal Pay Act liability. Every court to consider the question has ruled that an employer may not seek contribution or indemnity from labor unions for liability arising under the Equal Pay Act (Pet. App.D., p.11d; see also Brief in Opposition to Petition, pp. 6-12). The Solicitor General cites no contrary authority. Thus, the uncertainty and the possible danger of forum-shopping which may exist under the antitrust laws because of inconsistent judicial rulings (Solicitor General's Brief in Westvaco,

pp. 15-16) is not present here. The lower Courts have provided clear and consistent guidance on the issue of Equal Pay Act contribution.

Whether or not the Equal Employment Opportunity Commission has yet formulated a position on whether an injured employee may sue a union directly under the Equal Pay Act (Brief of Solicitor General, p. 6), there is no question that the Department of Labor, which administered the statute from its inception, consistently took a position against recognition of a right of employer contribution and against a private right of action against unions. See Brief in Opposition to Petition, p. 11 footnote. Northwest is thus asking the Court to review a ruling with which no Court or federal agency has disagreed.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in our prior Brief in Opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted,

STEPHEN B. MOLDOF

Of Counsel:

Keith E. Secular
Jay Levy-Warren

COHEN, WEISS and SIMON
Attorneys for Respondent
Air Line Pilots
Association, International

APR 4 1980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1056

NORTHWEST AIRLINES, INC.,
Petitioner

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

and

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

STEPHEN A. BOKAT
National Chamber Litigation Center
1615 H Street, N.W.
Washington, D.C. 20062

Attorney for Amicus Curiae Chamber of Commerce of the United States

Of Counsel:

STANLEY T. KALECZYC
National Chamber Litigation Center
1615 H Street, N.W.
Washington, D.C. 20062

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1056

NORTHWEST AIRLINES, INC.,
Petitioner

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,
and
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Chamber of Commerce of the United States of America hereby moves, pursuant to Supreme Court Rule 42(1), for leave to file a brief *amicus curiae* in support of the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on October 5, 1979. This motion is necessitated by

the refusal of respondents to consent to the filing of the appended brief.[1]

The interest of the *amicus curiae* is set forth in detail in its brief. To summarize, the Chamber of Commerce is the major federation of business and professional organizations, both large and small, with over 94,000 members. Despite tremendous, good-faith outlays of time and money in an attempt to comply with this nation's myriad and complex equal employment laws, compliance has proven to be difficult to achieve.

By creating substantial uncertainty as to when, if, and how, an employer facing liability to employees under the Equal Pay Act, 29 U.S.C. § 206(d)(2), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*, can seek contribution from labor unions representing their employees, the appellate court's decision directly impacts a substantial number of the Chamber's members. In particular, the Court of Appeals has totally precluded employers from obtaining contribution from a labor organization, for violation of the Equal Pay Act, no matter how great that organization's culpability.

Moreover by refusing to address the question of whether an employer liable under Title VII can seek contribution from a union, the appellate court has placed the Chamber's members who have or may be sued for violations of that statute in a difficult position regarding both settlement decisions and litigation strategy. That difficulty is further complicated by the D. C. Circuit's apparent suggestion that Petitioner may be barred from seeking contribution by the doctrine of laches, because Petitioner did not assert its

---

[1] Petitioner has consented, pursuant to Supreme Court Rule 42(1).

contribution claim early enough in the cause of the underlying discrimination action.

While counsel for Petitioner has more than adequately represented the interests of his client, the Chamber believes that it would be helpful for the Court to be aware of the adverse consequences to the entire business community of the opinion of the Court of Appeals for the District of Columbia Circuit, and accordingly, the necessity for this Court to resolve the issues presented in the petition. The Chamber believes, because of its representation of both large and small business, that it is the appropriate party to bring these factors to the Court's attention.

For these reasons, it is respectfully requested that the motion of the Chamber of Commerce of the United States for leave to file a brief *amicus curiae* in support of the petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit be granted.

Respectfully submitted,

STEPHEN A. BOKAT
National Chamber Litigation Center
1615 H Street, N.W.
Washington, D.C. 20062

Attorney for Amicus Curiae Chamber of Commerce of the United States

Of Counsel:

STANLEY T. KALECZYC

National Chamber Litigation Center
1615 H Street, N.W.
Washington, D.C. 20062

TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS CURIAE 1

REASONS FOR GRANTING THE WRIT 4

A. This Court Should Resolve the Important Question Of Whether An Employer Subject To Liability Under The Equal Pay Act Can Seek Contribution From A Union 4

B. The Court Of Appeals Has Created Substantial Uncertainty Regarding Employers' Rights To Contribution From Unions Under Title VII And When Those Rights, If They Exist, Must Be Asserted 7

CONCLUSION 11

TABLE OF AUTHORITIES

CASES:

Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) .. 5, 6

Carey v. *Greyhound Bus Co., Inc.*, 500 F.2d 1372 (5th Cir. 1974) 5

EEOC v. *Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975) 5

Guerra v. *Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974) 5

STATUTES:

Equal Pay Act of 1963

29 U.S.C. § 206(d)(1) 4

29 U.S.C. § 206(d)(2) 2, 4

Fair Labor Standards Act

29 U.S.C. § 202(a) 3

29 U.S.C. § 203(d), (e)(2), (r)(3), (s)(5), and (x) 3

Title VII of Civil Rights Act of 1964

42 U.S.C. § 2000(e) *et seq.* ..... passim

Table of Authorities Continued

Page

RULES AND REGULATIONS:

Fed.R.Civ.P. 14a 3

Reorganization Plan No. 1 of 1978, 43 Fed.Reg. 19807 (1978) 5

MISCELLANEOUS:

"Actionable Charges by Basis," Office of Public Affairs, EEOC (Nov. 30, 1979) 7, 9

Administrative Office of the U.S. Courts, *1979 Annual Report of the Director* (1979) 3

Arthur Anderson & Co., *Cost of Government Regulation* (March, 1979) 10

Barnhill-Hayes, Inc., *Employer Attitudes Toward Affirmative Action* (April, 1979) 3, 9

GAO Report by the Comptroller General, *Major Federal Equal Employment Programs Should Be Consolidated* (June 9, 1978) 9

W. Prosser, *Law of Torts* (4th ed. 1971) 8

B. Schlei and P. Grossman, *Employment Discrimination Law, 1979 Supplement* (1979) 9

R. G. Shaeffer and E. F. Lynton, *Corporate Experiences in Improving Women's Job Opportunities* (1979) 10

Union Liability for Employer Discrimination, 93 Harv. L.Rev. 702 (1980) 7

U.S. Department of Labor, *Reports to Congress: Minimum Wage and Maximum Hours Standards Under The Fair Labor Standards Act* (1979) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1056

NORTHWEST AIRLINES, INC.,
Petitioner

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,
and
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States (hereinafter, the Chamber) as *amicus curiae,* urges that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on October 5, 1979.

The Chamber is the major association of business and professional organizations, both large and small, in the United States with a total membership in excess of 90,000 corporations, partnerships proprietorships, and professionals, as well as over 3,700 state and local chambers of commerce and professional and trade associations.

The Chamber regularly represents its members' interests in litigation matters before the courts, the United States Congress, the Executive Branch and Federal Regulatory agencies. Such representation constitutes a significant aspect of the Chamber's activities and includes participation as an *amicus curiae* in numerous cases before this Court.[1]

The United States Court of Appeals for the District of Columbia Circuit has held that an employer subject to monetary liability to its employees for a violation of the Equal Pay Act, 29 U.S.C. § 206(d)(2), may never receive contribution from the union representing its employees, no matter what the extent of the union's involvement in causing that violation. Moreover, that Court has created substantial uncertainty about what circumstances, if any, and in what manner, an employer facing monetary liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*, may obtain contribution from a union. Inasmuch as a substantial portion of the Chamber's members are

---

[1] *New York Telephone* v. *New York Department of Labor*, —— U.S. ——, 59 L.Ed.2d 553 (1979); *U. of Calif. Regents* v. *Bakke*, 438 U.S. 265 (1978); *Scott Hudgens* v. *N.L.R.B.*, 427 U.S. 507 (1976); *Connell Construction Co., Inc.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975); *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute, et al.*, No. 78-911 (pending).

subject to these Acts,[2] the decision of the appellate court has an immediate adverse effect on them. The uncertainty created, in particular, by the Court's Title VII ruling will not only have an adverse impact on employers, but the court system as well. For, if any doubt exists as to when a union either must be joined pursuant to Fed.R.Civ.P. 14(a), or a separate action be initiated, it would behoove employers to do so immediately upon learning of a Title VII action. With an ever-increasing number of employment discrimination actions being filed yearly,[3] the increased burden on employers and courts of these added contribution actions is obvious.

---

[2] The Fair Labor Standards Act, to which the Equal Pay Act is amended, applies to all employers in industries engaged in commerces or in the production of goods for commerce employing two or more persons. *See* 29 U.S.C. § 202(a); and §§ 203(d), (e)(2), (r)(3), (s)(5) and (x).

Title VII of the Civil Rights Act of 1964 applies to all employers "engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000(e)(a).

[3] An average of more than 5,500 Title VII employment discrimination suits have been filed each year in the Federal courts since 1976. *See* Administrative Office of the U.S. Courts, 1979, Annual Report of the Director, Table 30 at 71 (1979). Obviously, if other employment discrimination actions, including Title VII were included, that figure would be far higher.

It is not surprising, therefore, that a recent survey of the 3,000 largest companies in America found that almost half of those companies responding had been subjected to a lawsuit involving affirmative action or EEO matters, and 77 percent had had a formal complaint made by an employee or former employee to an EEO enforcement body. Barnhill-Hayes, Inc., ***Employer Attitudes Toward Affirmative Action,*** pp. 50-51 (April, 1979). ***See also, infra,*** p. 9.

It is for these reasons that the Chamber respectively submits its views.[4]

REASONS FOR GRANTING THE WRIT

A. This Court Should Resolve The Important Question Of Whether An Employer Subject To Liability Under The Equal Pay Act Can Seek Contribution From A Union

The holding of the Court of Appeals that unions are immune from liability under the Equal Pay Act no matter how culpable the union may have been in causing a violation of the Act to occur, is both inequitable and illogical.

In the first place Congress, could have hardly intended such a result. For it not only prohibited employers from discriminating in wages paid to employees on the basis of sex,[5] but in the immediately succeeding section of the statute imposed a concomitant prohibition on unions:

> No labor organization, or its agents, representing employees . . . shall cause or attempt to cause . . . an employer to discriminate against an employee in violation of paragraph (1) . . .

29 U.S.C. § 206(d)(2).[6]

---

[4] The Chamber is fully in accord with, and accordingly supports the legal arguments of Petitioner. In filing this brief, it is not our intent to repeat those arguments, but rather to bring to the Court's attention significant policy reasons for granting the Petition.

[5] Section 206(d)(1) provides in relevant part:

> "No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work . . ."

[6] The Chamber does not wish to subject the Court to undue repetition of Petitioner's cogent argument that because courts

If this proscription is to be more than the proverbial "paper tiger," it must be backed by the same remedies that are imposed against employers.

Moreover, in view of the similar purposes of the two statutes, it defies logic for unions to be monetarily liable under Title VII as many courts have held,[7] yet be able to escape liability under the Equal Pay Act, as the D.C. Circuit has held.

This incongruity places the Equal Employment Opportunity Commission in a unique posture. Since 1978, the Commission has been given the responsibility for enforcing the Equal Pay Act as well as Title VII.[8] Obviously, the Commission will have discretion in sex discrimination cases involving disparate wages as to whether to file suit under the Equal Pay Act, Title VII, or both. If the court below were correct, the EEOC's selection of the statute under which it will file

---

have allowed direct actions by employees against unions for violation of the Equal Pay Act, and the Secretary of Labor has sought union liability under the Act, a similarly based contribution action by employers against unions exists. Accordingly, we respectfully refer the Court to pp. 10-12 of the Petition.

[7] *See e.g., Guerra* v. *Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974); *United States* v. *United States Steel Corp.*, 520 F.2d 1043 (5th Cir. 1975); *Carey* v. *Greyhound Bus Co., Inc.*, 500 F.2d 1372 (5th Cir. 1974); *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977). In *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975), this Court noted that:

> "It is the reasonably certain prospect of a back pay award that provide[s] the spur or catalyst which causes employers *and unions* to self-examine and to self-evaluate their employment practices . . ." [Emphasis added.]

[8] Pursuant to Reorganization Plan No. 1 of 1978, § 1, 43 Fed. Reg. 19807 (1978), enforcement authority for the Equal Pay Act was transferred from the Secretary of Labor to the EEOC.

suit would enable it to control whether or not the employer can seek contribution from any union that might be involved.[9] The Chamber believes that there is no justification for, in essence, taking the authority to determine if there should be contribution in a particular case away from the courts and giving it to the Commission.

As this Court has stated:

> Important national goals would be frustrated by a regime of discretion that 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.' *Morgane* v. *States Marine Lines,* 398 U.S. 375, 405.

Albemarle Paper Co. v. *Moody, supra* at 417.

The holding of the appellate court also opens the door for union abuse of the collective bargaining process. A union enjoying immunity from monetary liability may be in a position to bring undue pressure on an employer by bargaining to impasse on a contract clause that may open the employer to Equal Pay Act liability in the hope that the employer will "fold" on contractual provisions that are the union's ultimate objective.

The Chamber believes that all these issues warrant review by this Court. In this regard, the magnitude of the impact of sex discrimination actions on employers, the Commission, and the courts should not be ignored. The EEOC reports that over 30,000 actionable sex discrimination charges (over 40% of the Commission's

---

[9] This assumes, of course, that those courts which have held that an employer can seek contribution under Title VII are correct. We, of course, believe they are. *See infra,* pp. 7-10.

total case intake) were filed in 1978 alone.[10] Although there is no way of knowing what percentage of these cases might involve equal pay violations, as opposed to other forms of sex discrimination, it is reasonable to assume that a substantial number may involve disparate wage rates. Moreover, as Petitioner notes prior to transfer of Equal Pay Act responsibilities to the EEOC, the Secretary of Labor had pursued investigations and lawsuits on behalf of over 272,000 employees, resulting in recoveries in excess of $163 million. *See* U.S. Department of Labor, *Report to Congress: Minimum Wage and Maximum Hours Standards Under The Fair Labor Standards Act,* p. 35 (1979).

In view of the foregoing, we respectfully suggest that this Court is justified in granting the Petition to decide the important issues raised regarding the Equal Pay Act.

B. The Court Of Appeals Has Created Substantial Uncertainty Regarding Employers' Right To Contribution From Unions Under Title VII And When Those Rights, If They Exist, Must Be Asserted

Prior to the decision of the D.C. Circuit in this case, it was believed to be fairly well established that unions shared in the monetary liability for discrimination caused in whole or in part by a collective bargaining agreement. *See generally,* Note, *Union Liability for Employer Discrimination,* 93 Harv.L.Rev. 702 (1980). Yet, the appellate court has injected substantial doubt into this belief. Rather than describing the question of the union's liability under Title VII in a suit for con-

---

[10] "Actionable Charges by Basis," published by Office of Public Affairs, Equal Employment Opportunity Commission (November 30, 1979).

tribution, as one fairly well established, the court instead described the question as "a complex and sensitive" one. Appendix, p. 12d.

Moreover, the court further exacerbated the uncertainty by raising doubts whether Petitioner's claim for contribution was barred by the equitable doctrine of laches. The court's apparent belief that the doctrine is applicable is particularly disturbing in view of the traditional rule that a right of contribution does not arise until after the underlying action has terminated and the judgment paid, neither of which had occurred here. See W. Prosser, *Law of Torts,* § 50 at 309 and n. 80 (4th ed. 1971).

The appellate court's holding portends a tremendous potential impact on litigation under Title VII. For it would behoove any employer sued for a violation of Title VII to immediately join the union as a third party, even though the employer would not otherwise do so, either because he has doubts as to the validity of the claim or for other reasons. The addition of another party to an action can only complicate and delay it. It can potentially interfere with settlement negotiations, and quite obviously can only have an adverse impact on the unions themselves.

The practical effect of a laches rule would be to impel employers to join unions as co-defendants automatically as soon as they are sued. This result would further complicate American labor relations even though the judicial confrontation between employer and union will have been unnecessary in those cases in which the employee's claim fails on the merits. An employer ought to have the option to defer bringing a potentially unnecessary claim, just as Petitioner opted

here to await a ruling on the merits of the employees' allegations.

Even before the decision of the appellate court, the trend was toward one party to a collective bargaining agreement who was sued for a violation of Title VII, cross-claiming against the others, thereby bringing both the union and the employer before the court, even though the plaintiff failed to do so. *See* B. Schlei and P. Grossman, *Employment Discrimination Law, 1979 Supplement,* p. 135 (1979). Clearly, this is a trend to be discouraged. As employment discrimination cases are unduly complicated, the time and cost to all parties, as well as the burden on the EEOC and federal court system can only escalate.

There can be no doubt that those costs and burdens are already great. Seventy million employees are covered by Title VII. GAO Report by the Comptroller General, *Major Federal Equal Employment Opportunity Programs Should Be Consolidated.* (June 9, 1978). The EEOC reports that almost 75,000 actionable charges were filed in 1979 alone [11] and as we previously noted, Title VII cases filed in the Federal Courts have averaged over 5,500 per year for several years in a row.[12] In view of these statistics, it is not surprising that the previously cited study found that 48 percent of a group of large companies had been subjected to a lawsuit involving affirmative action or EEO matters, and 77 percent had had an employee make a formal complaint.[13]

---

[11] "Actionable Charges by Basis," supra.

[12] *See* n. 3, *supra.*

[13] Barnhill-Hayes study, *supra* at 3.

The results of this study are confirmed by those of yet another study which found that 33 percent of the companies surveyed had

These figures are obviously not cited to demonstrate that American business is not attempting to comply with this nation's equal employment laws—the opposite would appear to be the case [14]—but rather to demonstrate the tremendous impact of these laws on both industry and our judicial system.

Any holding, therefore, that unduly complicates and unnecessarily delays the steadily growing number of EEO cases is deserving of immediate review. Moreover, those affected by Title VII, employers, unions and employees, are entitled to a clear exposition of their rights and responsibilities.

---

had a state or federal sex discrimination lawsuit filed against them, and 37 percent had signed conciliation or consent agreements, or had court decrees entered against them which involved sex discrimination. R. G. Shaeffer and E. F. Lynton, *Corporate Experiences in Improving Women's Job Opportunities*, p. 77 (1979).

[14] A survey of 48 companies found that their total cost for complying with regulations of the Equal Employment Opportunity Commission was $217 million. Their individual costs ranged from approximately $10 per employee annually to $150 per employee annually. Arthur Andersen & Co., *Cost of Government Regulation* (March, 1978).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN A. BOKAT
National Chamber Litigation Center
1615 H Street, N.W.
Washington, D.C. 20062

Attorney for Amicus Curiae Chamber of Commerce of the United States

Of Counsel:

STANLEY T. KALECZYC

National Chamber Litigation Center
1615 H Street, N.W.
Washington, D.C. 20062

Supreme Court, U.S.
FILED
JUN 2 1980
MICHAEL RODAK, JR., CLERK

No. 79-1056

In the Supreme Court of the United States

OCTOBER TERM, 1979

NORTHWEST AIRLINES, INC., PETITIONER

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO

AND

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

LEROY D. CLARK
General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20506

INDEX

Page

Questions presented 1

Statement 2

Discussion 4

Conclusion 12

CITATIONS

Cases:

Brooklyn Savings Bank v. *O'Neil*, 324 U.S. 697 10

Caserta v. *Home Lines Agency, Inc.*, 273 F. 2d 943 10

Cooper Stevedoring Co. v. *Fritz Kopke, Inc.*, 417 U.S. 106 ..... 5, 6

Foremost Dairies, Inc. v. *Ivey*, 204 F. 2d 186 10

Halcyon Lines v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 4

Heizer Corp. v. *Ross*, 601 F. 2d 330 5

Hodgson v. *Sagner, Inc.*, 326 F. Supp. 371 11

Laffey v. *Northwest Airlines, Inc.*, 366 F. Supp. 763, aff'd in part and vacated in part, 567 F. 2d 429, cert. denied, 434 U.S. 1086 ..... 2, 3

McClanahan v. *Mathews*, 440 F. 2d 320 10

Overnight Motor Transp. Co. v. *Missel*, 316 U.S. 572 10

Page

Cases—(Continued):

Professional Beauty Supply, Inc. v. *National Beauty Supply, Inc.*, 594 F. 2d 1179 5

Stevenson v. *International Paper Co.*, 432 F. Supp. 390 5

Union Stock Yards Co. v. *Chicago B. & Q. R.R. Co.*, 196 U.S. 217 4

Wilson P. Abraham Construction Corp. v. *Texas Industries, Inc.*, 604 F. 2d 897, petitions for cert. pending *sub nom. Texas Industries, Inc.* v. *Radcliffe Materials, Inc.*, No. 79-1144 5

Statutes and rules:

Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e 1, 2, 3, 4, 5, 12

Equal Pay Act of 1963 (Fair Labor Standards Act of 1938), 29 U.S.C. 201 *et seq.* 1, 3, 4, 6, 7, 10, 11

29 U.S.C. 206(d) 1, 3, 4, 6, 7, 10

29 U.S.C. 206(d)(1) 2, 7

29 U.S.C. 206(d)(2) 6

29 U.S.C. 206(d)(3) 10

29 U.S.C. 216(b) 6, 10

29 U.S.C. 216(c) 6, 10

28 U.S.C. 1292(b) 4

Fed. R. Civ. P. 19(a) 2

Fed. R. Civ. P. 54(b) 4

Page

Miscellaneous:

108 Cong. Rec. 14752 (1962) 7

108 Cong. Rec. 14766-14767 ..... 8, 9

109 Cong. Rec. 9209 (1963) 9

Exec. Order No. 12067, 43 Fed. Reg. 28967 (1978) 1

Exec. Order No. 12144, 44 Fed. Reg. 37193 (1979) 1

H.R. 6060, 88 Cong., 1st Sess. (1963) 9

H.R. 11677, 87th Cong., 2d Sess. (1962) 7, 8, 9

Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978) 1, 6

Restatement (Second) Torts (1979) 5

W. Prosser, *Law of Torts* (4th ed. 1971) 5

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1056

NORTHWEST AIRLINES, INC., PETITIONER

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO

AND

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

The United States submits this brief pursuant to the Court's order of February 25, 1980 inviting it to express its views.[1]

QUESTIONS PRESENTED

1. Whether a right to contribution may be asserted against a labor organization by an employer held liable under the Equal Pay Act of 1963.

---

[1]The Equal Employment Opportunity Commission is the agency charged with the administration, interpretation, and enforcement of Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of

2. Whether a right to contribution may be asserted in a separate action by an employer held liable under Title VII of the Civil Rights Act of 1964 against a labor organization not named in a charge of discrimination filed with the Equal Employment Opportunity Commission.

STATEMENT

This suit had its genesis in *Laffey* v. *Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C. 1973), aff'd in part and vacated in part, 567 F. 2d 429 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978), in which Northwest Airlines was found to have violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Equal Pay Act of 1963, 29 U.S.C. 206(d), by compensating female cabin attendants less than male cabin attendants for substantially equal work. Northwest was ordered to disburse back pay to the plaintiff class under both statutes (Pet. App. 2b).

The discriminatory salary differentials found unlawful in *Laffey* were included in collective bargaining agreements between Northwest and the cabin attendants' successive unions, the Transport Workers Union (TWU) and the Air Line Pilots Association (ALPA) (Pet. App. 2b). However, only Northwest was named as a respondent in charges filed with the EEOC and as a defendant in the *Laffey* suit (*id.* at 9b). ALPA subsequently was included that action by plaintiffs as a non-aligned party under Fed. R. Civ. P. 19(a) without objection by Northwest, "solely for the limited purpose of assuring that the court [would] have before it all the parties necessary to effectuate relief * * *." 567 F. 2d at 477-478. ALPA did not, however, actively participate in the litigation (Pet. App. 4d).

1963, Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978); Exec. Order No. 12067, 43 Fed. Reg. 28967 (1978); Exec. Order No. 12144, 44 Fed. Reg. 37193 (1979). This case presents questions concerning an employer's right to contribution from labor organizations for back pay liability arising under both statutes.

After trial and entry of judgment against Northwest, the airline for the first time attempted to assert claims against the unions for contribution or indemnity. It moved for leave to file a third-party complaint against TWU and to amend its answer to assert a cross-claim against ALPA (Pet. App. 2b). Both motions were denied. The court of appeals affirmed that ruling as within the district court's discretion, noting (567 F. 2d at 477) that "[t]o have reopened the litigation at the point [Northwest Airlines] sought it would not only have been judicially uneconomical but would also have inflicted a hardship on the parties." Northwest did not seek review of this holding in its petition for certiorari in *Laffey*.

Northwest subsequently filed this separate action seeking a declaratory judgment determining its right to obtain reimbursement from TWU and ALPA for a portion of the monetary liability assessed against it in *Laffey* (Pet. App. 4d). The complaint alleged that the unions shared liability with the employer under the Equal Pay Act and Title VII because they had negotiated, executed, and enforced collective bargaining contracts prescribing the unlawful salary differentials (*ibid.*).

Ruling on the unions' motions to dismiss, the district court held (Pet. App. B) that there is a federal common law right to contribution for liability under Title VII but not under the Equal Pay Act. Regarding the Equal Pay Act, the court concluded that neither employees nor employers have a right of action against labor organizations for violations of the Act and that to imply such a right as a predicate for contribution would conflict with the policies underlying the statute (*id.* at 3b-7b). As to Title VII, the district court held that although the filing of a charge with the EEOC is a prerequisite to bringing suit, the failure of the *Laffey* plaintiffs to name

the unions in a charge did not bar contribution because a cause of action for contribution arises under federal common law rather than under Title VII (*id.* at 8b-10b). The court further concluded that a right to contribution from labor organizations, which are jointly liable for back pay under Title VII, would further the policies of the statute by insuring that unions bear their fair share of that liability (*id.* at 15b-16b). The district court entered judgment under Fed. R. Civ. P. 54(b) as to the Equal Pay Act contribution claim and certified for interlocutory appeal under 28 U.S.C. 1292(b) its order regarding contribution for liability arising under Title VII.

The court of appeals affirmed the dismissal of the claim for contribution for Equal Pay Act liability but reversed and remanded for a determination of whether the Title VII contribution claim was barred by laches (Pet. App. D). The court held that a right to contribution from labor organizations would be inconsistent with the policies and scheme of the Equal Pay Act because Congress did not intend to render unions jointly liable to private plaintiffs for violations of the statute (*id.* at 10d-11d). The court of appeals declined to decide whether a right to contribution exists for liability incurred under Title VII. Instead, in view of questions raised on appeal as to whether the Title VII contribution claim was timely asserted the court remanded to allow the district court to resolve the issue in the first instance (*ibid.*).

DISCUSSION

1. The early federal rule, enunciated in *Union Stock Yards Co.* v. *Chicago B. & Q. R.R. Co.*, 196 U.S. 217 (1905), was that there could be no contribution among joint tortfeasors. See *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285 (1952); W. Prosser, *Law of Torts* §50 at 305-306 (4th ed. 1971);

Restatement (Second) Torts §886A, Comment *a* (1979). However, in *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 111 (1974), an admiralty case, this Court specifically repudiated "the occasional breadth of its [earlier] dictum" and fashioned a right to contribution in an area in which contribution had not traditionally been recognized. The Court reasoned (*ibid.*) (citation omitted) that "a 'more equal distribution of justice' can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame."

Since *Cooper*, lower courts have applied its rationale in a variety of contexts, concluding that a federal common law right to contribution may be available where liability arises out of a statute that itself is silent on the question, so long as contribution is consistent with the statute's purposes. See, *e.g.*, *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F. 2d 897 (5th Cir. 1979), petitions for cert. pending *sub. nom. Texas Industries, Inc.* v. *Radcliffe Materials, Inc.*, No. 79-1144 (contribution conflicts with the purposes of the antitrust laws); *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F. 2d 1179 (8th Cir. 1979) (contribution available to the extent it promotes fairness without undermining deterrent effect of antitrust laws); *Heizer Corp.* v. *Ross*, 601 F. 2d 330, 332 (7th Cir. 1979) (contribution available for violations of Rule 10b-5 in part because it reinforces "policy underlying the securities laws"). See also *Stevenson* v. *International Paper Co.*, 432 F. Supp. 390, 408-409 (W.D. La. 1977) (contribution available where liability arises under Title VII of the Civil Rights Act of 1964).

Whether *Cooper* should be thus extended is, of course, open to debate. See Br. for the United States as Amicus Curiae in *Westvaco Corp.* v. *Adams Extract Company*, No. 79-972.[2] Many of the considerations which militate against a right to contribution in antitrust cases apply with equal force under the Equal Pay Act. The question of a right to contribution by employers against unions for Equal Pay Act violations, moreover, requires resolution of a difficult threshold problem on which the EEOC has not yet formulated a position, namely, whether an injured employee may sue the union directly. Every approach to the contribution issue begins with the assumption that the injured party could have sued and recovered against more than one defendant. If employee suits cannot be brought against unions under the Equal Pay Act, that threshold requirement will not have been met.

The Equal Pay Act does not, by its own terms, authorize anyone to sue anybody. It simply prohibits employers from engaging in specified conduct (29 U.S.C. 206(d)(1)) and prohibits labor organizations from "caus-[ing] or attempt[ing] to cause" employers to do so (29 U.S.C. 206(d)(2)). For enforcement purposes, Congress merged the Equal Pay Act into the Fair Labor Standards Act of 1938. That statute provides for private actions by employees against employers (29 U.S.C. 216(b)), and for actions by the Secretary of Labor[3] "to recover the amount of " any illegal wage differential claimed by an employee (29 U.S.C. 216(c)). It does not, however, expressly authorize suits by employees against unions. Therefore, a

---

[2]We are furnishing a copy of that brief to counsel in the present case.

[3]This enforcement authority was transferred to the EEOC by Reorganization Plan No. 1 of 1978. See note 1, *supra*.

private right of action against a union, if it exists, must be implied from the structure, legislative history and purposes of the Equal Pay Act.[4]

There is much to suggest that Congress intended that unions would be covered by the Pay Act and held accountable under it in the same manner and to the same extent as employers. In 1962, an "equal pay" bill, H.R. 11677, passed both houses of Congress but was not enacted prior to the close of the session. An amendment bringing labor unions within the bill's sweep was debated extensively on the floor of the House and passed. That provision is substantially identical to the cognate provision in the Equal Pay Act of 1963.[5] Representative Griffin, a proponent of the amendment, described its purpose as follows (108 Cong. Rec. 14752) (1962) (emphasis added):

> [I]f we are to prohibit an employer * * * from discriminating in the payment of wages on the basis of sex, then surely it is only reasonable to make the prohibition applicable insofar as possible to labor

---

[4]Clearly the FLSA, apart from the Equal Pay Act, does not provide a basis for implying a private right of action for employees against unions. Nowhere else in the FLSA is there a provision comparable to 29 U.S.C. 206(d) (prohibiting unions from causing employers to violate the statute). Nor does the legislative history of the FLSA, apart from the discrete history of the Pay Act, evidence an intent to reach union as well as employer conduct. Conversely, were this Court to conclude that a private right of action should be implied under the Pay Act, that determination should not be extended to the minimum wage, maximum hours and child labor provisions of the FLSA.

[5]The principal difference between the overall bill passed but not enacted in 1962 and the bill enacted in 1963 is that the latter adopted the enforcement scheme of the Fair Labor Standards Act.

> organizations, for they are often directly involved in creating the conditions or situations which are discriminatory.
>
> * * * * *
>
> The amendment to include labor unions * * * is a good amendment from another standpoint: *labor unions are made accountable and responsible for their part*, if any, in discriminating against women, this should help immeasureably in the administration of this act. Those who do not want hordes of bureaucrats roaming around to enforce this law can find here a way to make the bill self-policing, at least in establishments where there is union organization.

Representative Zelenko, who offered the amendment, added (108 Cong. Rec. 14766-14767 (1962)) (emphasis added):

> [T]here is included in the bill a prohibition against the labor unions or organizations that might attempt to coerce or influence or bargain an employer to violate the provisions of this [A]ct. Up to this point, it was the employer that was liable. But it is thought that, perhaps, in his bargaining activities between labor management and unions, there might come a point where because of the insistence of a labor union, he might be obliged to violate the law as it applies to discrimination regarding the sexes. * * * [O]rganized labor is in favor of this amendment. They are willing to be placed in this bill and *to be subject to its penalties*, if they are involved in any violation.[6]

---

[6]The terms of the 1962 bill authorized the district court to order payment of back wages by the "respondent" which was defined as the "employer or labor organization." Amendment to H.R. 11677 §§6(a),

These themes were echoed in the debate on the bill, H.R. 6060, that became the Equal Pay Act of 1963. For example, Representative Goodell, the man primarily responsible for merging the Pay Act into the FLSA, described the provision relating to union liability (109 Cong. Rec. 9209 (1963)):

> * * * I would like to ask the gentleman from Michigan [Mr. O'Hara] * * * to respond to this.
>
> We have been concerned here in a situation where an employer is bound by an existing agreement as to a wage differential * * * that * * * violates this [A]ct[7]—it discriminates against women. * * * [T]his bill as now written obligates the union and gives the union the responsibility to negotiate * * * to eliminate the discrimination and gives the Secretary of Labor, if necessary, the power to enjoin not only the employer but the union, to sit down and negotiate and eliminate the discrimination in violation of this [A]ct.

In response, Representative O'Hara, a member of the subcommittee which drafted the final bill, stressed (*ibid.*) (emphasis added) "that if a labor organization is in any way at fault in maintaining such a discriminatory wage rate, *they would be subject to all the penalties and all the enforcement provisions provided under the Fair Labor Standards Act.*"

Based on this history, it can be argued that Congress intended that unions and employers would be treated equally, and that the failure of the FLSA by its terms to reflect that equality simply reflects the fact that the statute was not drafted with unions in mind. See note 4, *supra.*

(d), 108 Cong. Rec. 14766 (1962). The bill provided for suit by the Secretary of Labor, but did not expressly create a private right of action.

At the same time, however, a sound argument can be made that a private right of action against unions is contrary to the basic purpose and structure of the Equal Pay Act. In order to mesh the Pay Act with the Fair Labor Standards Act, Congress provided (29 U.S.C. 206(d)(3)) that salary and wage differentials made unlawful by the Pay Act "shall be deemed to be unpaid minimum wages or unpaid overtime compensation under [the FLSA]." In essence, an employer who violates the equal pay provisions of the statute has, like the employer who fails to pay the statutory minimum wage, obtained services without paying full value for them.[7] The measure of damages under the FLSA is the difference between what the employer should have paid and what it in fact did pay.

It is difficult to see how unions fit into this scheme. Although a union certainly may "cause" an employer to adopt salary or wage differentials that violate the Equal Pay Act, it would not benefit financially thereby. Thus, while in such circumstances the union would itself have

---

[7]This is true even though the statute provides for payment of liquidated (double) damages. 29 U.S.C. 216(b) and (c). The central purpose of such an award is to compensate employees for the delay in receipt of back wages owing under the Act. See *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 707-708 (1945); *Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572, 583-584 (1942). As this Court observed in the latter case, "retention of a work[er's] pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages." See also *McClanahan* v. *Mathews*, 440 F. 2d 320, 322-323 (6th Cir. 1971); *Caserta* v. *Home Lines Agency, Inc.*, 273 F. 2d 943, 947 (2d Cir. 1959); *Foremost Dairies, Inc.* v. *Ivey*, 204 F. 2d 186, 190 (5th Cir. 1953).

violated the Pay Act, monetary recovery against it ordinarily would be inconsistent with the rationale of the statute.[8]

In sum, the question whether a private right of action against unions should be implied under the Equal Pay Act is a difficult one. This Court might well benefit from further development of the issue in the lower courts. Moreover, it may be appropriate for the question to be resolved, in the first instance, in the context of an attempted employee suit against a union rather than in a contribution action brought by an employer held to have violated the Pay Act.

The considerations that militate against an implied private right of action may well be a reason to deny a right of contribution against unions under the Equal Pay Act even if there is an implied private right of action against them under that Act. The fact, previously noted (pages 10-11, *supra*), that the employer has benefited financially from the violation while the union has not is, if anything, even more pertinent to the equitable considerations bearing on a right to contribution than to the question of the implied private right of action.

We have suggested that the Court grant certiorari in *Westvaco Corp.* v. *Adams Extract Co.*, No. 79-972. Should the Court do so, it may wish to hold this petition pending a decision in that case, and then remand this case for reconsideration in light of whatever principles of

---

[8]It may be, however, that recovery would be available under Title VII. Injunctive relief, and perhaps monetary relief in flagrant cases, may also be available under the Equal Pay Act in suits by the Commission against unions. See *Hodgson* v. *Sagner, Inc.*, 326 F. Supp. 371 (D. Md. 1971), aff'd per curiam on opinion below, 462 F. 2d 180 (4th Cir. 1972).

contribution are enunciated therein. Should certiorari be denied in *Westvaco*, we submit that it should be denied in this case as well.

2. We agree with respondents that the issues raised by the petition with respect to Northwest's contribution claim growing out of its Title VII violations are premature. The court of appeals did not reach these issues. Instead, it remanded the Title VII-based contribution claim to the district court for a determination of whether, in light of arguments made by the unions and the EEOC on appeal,[9] this separate action for contribution was untimely. Further review is therefore inappropriate at this time: the court of appeals has not decided the substantive question of whether a right to contribution for Title VII liability should be recognized and neither of the lower courts has decided the timeliness issue.

CONCLUSION

If certiorari is granted in *Westvaco Corp.* v. *Adams Extract Co.*, No. 79-972, this petition should be held and the case remanded in light of the Court's decision in that

---

[9]In the court of appeals, the unions urged that the airline's claim was barred by laches, and the EEOC, while stating that a right to contribution exists in appropriate circumstances under Title VII, argued that Title VII's policy in favor of voluntary settlement should be given effect by requiring that a defendant assert a claim for contribution prior to judgment in the initial Title VII proceeding, after securing a stay and requesting conciliation by the EEOC (Pet. App. 12d). Although the EEOC urged the court of appeals to dismiss this separate action for contribution on the ground that it is untimely, the court remanded for a determination whether the action has been delayed unnecessarily under the circumstances of this case.

case or, in the alternative, this petition should be denied. If certiorari is denied in *Westvaco*, this petition for a writ of certiorari should be denied as well.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

LEROY D. CLARK
General Counsel
Equal Employment Opportunity Commission

JUNE 1980

DOJ-1980-06

Supreme Court, U. S.
FILED
AUG 29 1980
MICHAEL RODAK, JR., CLERK

No. 79-1056

IN THE

Supreme Court of the United States

October Term, 1980

NORTHWEST AIRLINES, INC.,
Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

AND

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF NORTHWEST AIRLINES, INC.

PHILIP A. LACOVARA
Hughes Hubbard & Reed
1660 L Street, N.W.
Washington, D.C. 20036
(202) 862-7400

Attorney for Petitioner
Northwest Airlines, Inc.

Of counsel:

Jay Kelly Wright
William R. Stein
Marcy J. K. Tiffany

QUESTIONS PRESENTED

1. Whether labor unions that cause or join violations of federal employment discrimination laws (Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963) are nevertheless immune from an employer's claim for contribution for a portion of the backpay awarded in a suit against the employer alone, even though the unions are equally liable for the discriminatory practices.

2. Whether, if employers may obtain contribution against unions for backpay awards based on federal employment discrimination laws, any special rules of timeliness or procedure must be superimposed upon the rules that ordinarily govern the assertion of contribution claims in the federal courts.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT	2
A. The Underlying Employment Discrimination Claim Concerning the Pay Differential	2
B. The Participation Of The Unions in Establishing And Maintaining The Pay Differential	4
C. The Determination of Northwest's Liability	6
D. The Efforts To Obtain Contribution	6
SUMMARY OF ARGUMENT	7
ARGUMENT	11
I. AN EMPLOYER SHOULD BE ALLOWED TO OBTAIN CONTRIBUTION FROM A UNION FOR LIABILITY BASED ON A VIOLATION OF THE FEDERAL EMPLOYMENT DISCRIMINATION LAWS WHEN BOTH THE EMPLOYER AND THE UNION ARE RESPONSIBLE FOR THE DISCRIMINATORY PRACTICE	
A. The Federal Courts Have Joined State Courts in Recognizing the Equitable Propriety Of Contribution	11
B. Contribution Should Be Permitted From Unions Under The Federal Employment Discrimination Laws	16
1. Unions bear equal responsibility for Title VII violations	16
2. Unions are subject to independent monetary liability for causing violations of the Equal Pay Act	21

Page

(a) Union liability directly under the Act 22

(b) Union liability under other doctrines 29

3. Allowing contribution will advance the policy of eliminating employment discrimination 34

4. Allowing contribution will promote fairness and even-handed enforcement of the employment discrimination laws . 40

5. Recognizing contribution will not unduly complicate employment discrimination suits or lead to unjustified raids on union treasuries 42

II. NO SPECIAL RULES GOVERNING TIMELINESS AND PROCEDURE SHOULD APPLY TO CONTRIBUTION CLAIMS IN EMPLOYMENT DISCRIMINATION CASES 45

A. Contribution Claims May Always Be Asserted In A Separate Action Filed After Judgment Is Entered In The Underlying Case 45

B. Special Procedural Rules Governing Contribution For Employment Discrimination Liability Are Unwarranted 48

C. The Failure To File An EEOC Charge Against A Union Does Not Bar An Employer's Claim For Contribution 51

CONCLUSION 53

Appendix A: States That Recognize The Right to Contribution 1a

TABLE OF AUTHORITIES

Cases:	Page
Ainsworth v. *Berg*, 253 Wis. 438, 34 N.W.2d 790 (1948), *on rehearing*, 253 Wis. 445a, 35 N.W.2d 911 (1949)	52
Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975)	13,17, 34,40, 46
Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974)	13
Ammons v. *Zia Co.*, 448 F.2d 117 (10th Cir. 1971)	31
Bair v. *Bryant*, 96 A.2d 508 (D.C. Ct. App. 1953)	47
Bernard v. *Gulf Oil Co.*, 596 F.2d 1249 (5th Cir. 1979)	46
Bertone v. *Turco Products, Inc.*, 252 F.2d 726 (3d Cir. 1958)	14
Bivens v. *Six Unknown Named Agents*, 403 U.S. 388 (1971)	12
Blanton v. *Southern Bell Telephone & Telegraph Co.*, 49 F.R.D. 162 (N.D. Ga. 1970)	39
Brennan v. *Emerald Renovators, Inc.*, 410 F. Supp. 1057 (S.D.N.Y. 1975)	28
Bundy v. *City of New York*, 23 App. Div. 2d 392, 261 N.Y.S.2d 221 (1965)	29
Bush v. *Lone Star Steel Corp.*, 373 F. Supp. 526 (E.D. Tex. 1974)	41
Cannon v. *University of Chicago*, 441 U.S. 677 (1979)	23,24, 28
Carey v. *Greyhound Bus Co., Inc.*, 500 F.2d 1372 (5th Cir. 1974)	39
Cartel Capital Corp. v. *Fireco of New Jersey*, 81 N.J. 548, 410 A.2d 674 (1980)	29
Choate v. *Caterpillar Tractor Co.*, 402 F.2d 357 (7th Cir. 1968)	49

	Page
Chrapliwy v. *Uniroyal, Inc.*, 458 F. Supp. 252 (N.D. Ind. 1977)	20,32, 33
City of Kingsport v. *SCM Corp.*, 429 F. Supp. 96 (E.D. Tenn. 1976)	29
Communications Workers v. *Illinois Bell Telephone Co.*, 12 E.P.D. ¶11,275 (N.D. Ill. 1973)	34,39
Cooper v. *Philadelphia Dairy Products Co.*, 34 N.J. Super. 301, 112 A.2d 308 (1955)	52
Cooper Stevedoring Co., Inc. v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974)	13,14, 42
Corning Glass Works v. *Brennan*, 417 U.S. 188 (1974)	30
Costello v. *United States*, 365 U.S. 265 (1961)	46
Czosek v. *O'Mara*, 397 U.S. 25 (1970)	33
Denicola v. *G. C. Murphy Co.*, 562 F.2d 889 (3d Cir. 1977)	20,28, 39
Dennler v. *Dodge Transfer Co.*, 201 F. Supp. 431 (D. Conn. 1962)	47
DeVore Brokerage Co. v. *Goodyear Tire & Rubber Co.*, 308 F. Supp. 279 (M.D. Tenn. 1969)	46
Dickerson v. *United States Steel Corp.*, 439 F. Supp. 55 (E.D. Pa. 1977), *additional opinion*, 472 F. Supp. 1304 (E.D. Pa. 1978), *vacated and remanded on other grounds*, 616 F.2d 698 (3d Cir. 1980)	20
Donnell v. *General Motors Corp.*, 576 F.2d 1292 (8th Cir. 1978)	20
Dunlop v. *Beloit College*, 411 F. Supp. 398 (W.D. Wis. 1976)	23
Edmonds v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979)	42
EEOC v. *Air Line Pilots Association*, 489 F. Supp. 1003 (D. Minn. 1980)	27,36, 41

	Page
EEOC v. *Steamfitters Local 638*, 542 F.2d 579 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977)	36
Falciani v. *Philadelphia Transportation Co.*, 189 F. Supp. 203 (E.D. Pa. 1960)	47
Farmer v. *Hotel Workers Local 1064*, 19 E.P.D. ¶9075, 99 L.R.R.M. 2166 (E.D. Mich. 1979)	20,32, 33,34 36
Fischbach & Moore International Corp. v. *Crane Barge R-14*, 476 F. Supp. 282 (D. Md. 1979)	29
Ford Motor Co. v. *Huffman*, 345 U.S. 330 (1953)	32
Foust v. *Safeway Stores, Inc.* 556 F.2d 946 (9th Cir. 1977)	51
Funk v. *United States*, 290 U.S. 371 (1933)	12
George's Radio, Inc. v. *Capital Transit Co.*, 126 F.2d 219 (D.C. Cir. 1942)	15
Gilbert v. *General Electric Co.*, 59 F.R.D. 267 (E.D. Va. 1973)	39
Globus, Inc. v. *Law Research Service, Inc.*, 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971)	12,15
Glus v. *G. C. Murphy Co.*, 329 F. Supp. 563 (W.D. Pa. 1971)	32
Glus v. *G. C. Murphy Co.*, 23 F.E.P. Cas. 86 (3d Cir. 1980), *aff'g district court after remand from* 562 F.2d 880 (3d Cir. 1977)	13,35, 39,43 51,52
Godfrey v. *Tidewater Power Co.*, 223 N.C. 647, 27 S.E.2d 736 (1943)	52
Gomes v. *Brodhurst*, 394 F.2d 465 (3d Cir. 1968)	15
Gould v. *American-Hawaiian Steamship Co.*, 387 F. Supp. 163 (D. Del. 1974), *vacated and remanded on other grounds*, 535 F.2d 761 (3d Cir. 1976)	15

	Page
Grogg v. *General Motors Corp.*, 72 F.R.D. 523 (S.D.N.Y. 1976)	39,52
Guerra v. *Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974)	41
Guillard v. *Niagara Machine & Tool Works*, 488 F.2d 20 (8th Cir. 1973)	29
Halcyon Lines v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952)	14
Harris v. *Standard Accident & Insurance Co.*, 297 F.2d 627 (2d Cir. 1961), *cert. denied*, 369 U.S. 843 (1962)	47
Hartford Accident & Indemnity Co. v. *R. Herschel Mfg. Co.*, 453 F. Supp. 1375 (D.N.D. 1978)	29
Hecht Co. v. *Bowles*, 321 U.S. 321 (1944)	40
Heizer Corp. v. *Ross*, 601 F.2d 330 (7th Cir. 1979)	15
Hodgson v. *Sagner, Inc.*, 326 F. Supp. 371 (D. Md. 1971), *aff'd*, 462 F.2d 180 (4th Cir. 1972)	23,27
Huggins v. *Graves*, 210 F. Supp. 98 (E.D. Tenn. 1962), *aff'd*, 337 F.2d 486 (6th Cir. 1964)	46
Hunsucker v. *High Point Bending & Chair Co.*, 237 N.C. 559, 75 S.E.2d 768 (1953)	14
Illinois v. *Milwaukee*, 406 U.S. 91 (1972)	12
In re Newman, 85 N.L.R.B. 725 (1949)	17
International Brotherhood of Electrical Workers v. *Foust*, 442 U.S. 42 (1979)	32,33
International Union of Electrical, Radio & Machine Workers v. *Westinghouse Electric Corp.*, 73 F.R.D. 57 (W.D.N.Y. 1976)	39
Iowa Power & Light Co. v. *Abild Construction Co.*, 259 Iowa 314, 144 N.W.2d 303 (1966)	14
J.I. Case Co. v. *Borak*, 377 U.S. 426 (1964)	23
Johnson v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974)	35,41
Johnson v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975)	51

	Page
Jones v. *Trans World Airlines, Inc.*, 495 F.2d 790 (2d Cir. 1974)	33
Judson v. *Peoples Bank & Trust Co.*, 17 N.J. 67, 110 A.2d 24 (1954)	12
Keleket X-Ray Corp. v. *United States*, 275 F.2d 167 (D.C. Cir. 1960)	46,52
Kohr v. *Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975)	14
Laffey v. *Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C. 1973)	*passim*
Laffey v. *Northwest Airlines, Inc.*, 374 F. Supp. 1382 (D.D.C. 1974), *aff'd in part, vacated in part and remanded*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978)	*passim*
Los Angeles Department of Water & Power v. *Manhart*, 435 U.S. 702 (1978)	13,40, 45
Lynch v. *Sperry Rand Corp.*, 62 F.R.D. 78 (S.D.N.Y. 1973)	39
Mahone v. *McGraw-Edison Co.*, 281 F. Supp. 582 (E.D. Va. 1968)	14
McDonald v. *General Mills, Inc.*, 387 F. Supp. 24 (E.D. Cal. 1974)	52
Miller v. *International Paper Co.*, 408 F.2d 283 (5th Cir. 1969)	49
Minneapolis, St. Paul and Sault Ste. Marie Railroad Co. v. *City of Fond du Lac*, 297 F.2d 583 (7th Cir. 1961)	47
Murphy v. *Miller Brewing Co.*, 307 F. Supp. 829 (E.D. Wis. 1969), *aff'd sub nom. Hodgson* v. *Miller Brewing Co.*, 457 F.2d 221 (7th Cir. 1972)	28
Myers v. *Gilman Paper Corp.*, 392 F. Supp. 413 (S.D. Ga. 1975), *aff'd*, 544 F.2d 837 (5th Cir.), *modified on other grounds on rehearing*, 556 F.2d 758 (5th Cir.), *cert. dismissed*, 434 U.S. 801 (1977)	38,39, 41,43

	Page
NLRB v. *Alaska S. S. Co.*, 211 F.2d 357 (9th Cir. 1954)	17
NLRB v. *Gottfried Baking Co.*, 210 F.2d 772 (2d Cir. 1954)	17
Nolechek v. *Gesuale*, 46 N.Y.2d 332, 413 N.Y.S.2d 340, 385 N.E.2d 1268 (1978)	52
Northwest Airlines, Inc. v. *Transport Workers Union*, 10 E.P.D. ¶10,484 (D.D.C. 1975)	48
Northwest Airlines, Inc. v. *Transport Workers Union*, 82 Lab. Cas. ¶33,549, 14 E.P.D. ¶7730 (D.D.C. 1977), *aff'd in part and remanded in part*, 606 F.2d 1350 (D.C. Cir. 1979), *cert. granted*, No. 79-1056 (U.S., June 16, 1980) (48 U.S.L.W. 3820)	1,35
Osborne v. *McCall Printing Co.*, 4 F.E.P. Cas. 276 (S.D. Ohio 1972)	39,52
Parson v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374 (5th Cir. 1978), *cert. denied*, 441 U.S. 968 (1979)	20,39
Patterson v. *American Tobacco Co.*, 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976)	20,39
Petersen v. *Rath Packing Co.*, 461 F.2d 312 (8th Cir. 1972)	33
Professional Beauty Supply, Inc. v. *National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979)	15
Radio Officers v. *NLRB*, 347 U.S. 17 (1954)	17
Richardson v. *Communications Workers*, 443 F.2d 974 (8th Cir. 1971), *cert. denied*, 414 U.S. 818 (1973)	33
Russell v. *American Tobacco Co.*, 528 F.2d 357 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976)	49
Scheuer v. *Rhodes*, 416 U.S. 232 (1974)	2
Schultz v. *Wheaton Glass Co.*, 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970)	30

	Page
Sears v. *Atchison, Topeka & Santa Fe Railway*, 454 F. Supp. 158 (D. Kan. 1978)	20
Sinyard v. *Foote & Davies Div. of McCall Corp.*, 577 F.2d 943 (5th Cir. 1978)	28
Smith v. *Southern Farm Bureau Casualty Insurance Co.*, 247 La. 695, 174 So.2d 122 (1965)	52
Smith v. *Whitmore*, 270 F.2d 741 (3d Cir. 1959)	46
Steele v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944)	32
Stencel Aero Engineering Corp. v. *United States*, 431 U.S. 666 (1977)	14
Stevenson v. *International Paper Co.*, 432 F. Supp. 390 (W.D. La. 1977)	20,34, 39
Sullivan v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969)	12
Textile Workers v. *Lincoln Mills*, 353 U.S. 448 (1957)	12
The Max Morris, 137 U.S. 1 (1890)	42
Torockio v. *Chamberlain Manufacturing Corp.*, 51 F.R.D. 517 (W.D. Pa. 1970)	39
Transamerica Mortgage Advisors, Inc. v. *Lewis*, 444 U.S. 11 (1979)	26
Union Starch & Refining Co. v. *NLRB*, 186 F.2d 1008 (7th Cir.), *cert. denied*, 342 U.S. 815 (1951)	17
United States v. *Reliable Transfer Co.*, 421 U.S. 397 (1975)	41
United States v. *Republic Steel Corp.*, 362 U.S. 482 (1960)	12
United States v. *Yellow Cab Co.*, 340 U.S. 543 (1951)	14
Vaca v. *Sipes*, 386 U.S. 171 (1967)	32
Val Marine Corp. v. *Costas*, 256 F.2d 911 (2d Cir. 1958)	47
Wassel v. *Eglowsky*, 399 F. Supp. 1330 (D. Md. 1975), *aff'd*, 542 F.2d 1235 (4th Cir. 1976)	15

	Page
Westvaco Corp. v. *Adams Extract Co.*, No. 79-972 (U.S., petition for certiorari granted, June 16, 1980) (48 U.S.L.W. 3820)	15
Wilson P. Abraham Construction Corp. v. *Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979), *petition for cert. pending sub nom. Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, No. 79-1144 (U.S., filed Jan. 24, 1980) (48 U.S.L.W. 3570)	15
Winfield v. *St. Joe Paper Co.*, 15 F.E.P. Cas. 1497 (N.D. Fla. 1977)	39
Wirtz v. *Hayes Industries, Inc.*, 1 E.P.D. ¶9874 (N.D. Ohio 1968)	34
Wyandotte Transportation Co. v. *United States*, 389 U.S. 191 (1967)	12
Zapico v. *Bucyrus-Erie Co.*, 579 F.2d 714 (2d Cir. 1978)	12
Zontelli Brothers v. *Northern Pacific Railway*, 263 F.2d 194 (8th Cir. 1959)	31
Statutes:	
Administrative Procedure Act, 5 U.S.C. § 552(a)(2)	50
Judiciary and Judicial Procedure Act,	
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	51
28 U.S.C. § 1332	52
Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.*	47
Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680	14
National Labor Relations Act, § 10c, 29 U.S.C. § 106(c)	17
Fair Labor Standards Act, 29 U.S.C. §§ 201-219, 255	*passim*
Equal Pay Act of 1963,	
29 U.S.C. § 206(d)	*passim*

	Page
29 U.S.C. § 216(a)-(d)	2,22, 23,26
29 U.S.C. § 217	2
Labor-Management Reporting and Disclosure Act of 1959, § 201(b), 29 U.S.C. § 431(b)	44
Age Discrimination in Employment Act, 29 U.S.C. § 626(b)	27,41
29 U.S.C. § 623(a)(1)	36,37
Civil Rights Act of 1870, 42 U.S.C. § 1981	51
Title VII of Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*	*passim*
Federal Employers Liability Act, 45 U.S.C. §§ 51 *et seq.*	31
Railway Labor Act, 45 U.S.C. §§ 152, 181	32
Federal Aviation Act, 49 U.S.C. §§ 1301 *et seq.*	14
Rules and Regulations:	
Fed. R. Civ. P. 13(g) and (h)	49
Fed. R. Civ. P. 14(a)	49
EEOC Compliance Manual (CCH) § 62.7(c) (1979)	50
Reorganization Plan No. 1 of 1978, § 1, 43 Fed. Reg. 19807 (1978)	22
Legislative History:	
H.R. 11677, 87th Cong., 2d Sess. (1962)	24,25
H.R. Rep. No. 570, 88th Cong., 1st Sess. (1963)	18
H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963)	17
Hearings on Civil Rights Before Subcommittee No. 5 of the House Judiciary Committee, Serial No. 4, 88th Cong., 1st Sess. (1963)	18,19
Hearings on H.R. 405 and Similar Bills to Prohibit Discrimination in Employment Before the General Subcommittee on Labor of the House Education and Labor Committee, 88th Cong., 1st Sess. (1963)	18,19

	Page
Hearings on Proposed Federal Legislation to Prohibit Discrimination in Employment Before the Special Subcommittee on Labor of the House Education and Labor Committee, Part 2, 87th Cong., 2d Sess. (1962)	17,18, 19
Hearings on Proposed Federal Legislation to Prohibit Discrimination in Employment Before the Special Subcommittee on Labor of the House Education and Labor Committee, Part 1, 87th Cong., 1st Sess. (1961)	17,19
111 Cong. Rec. 13359 (1965)	30
110 Cong. Rec. 13647 (1964)	30
110 Cong. Rec. 13169 (1964)	17
110 Cong. Rec. 7209 (1964)	17
110 Cong. Rec. 7207 (1964)	17
109 Cong. Rec. 9209 (1963)	26
109 Cong. Rec. 9197 (1963)	26
109 Cong. Rec. 9193 (1963)	25
109 Cong. Rec. 7223 (1963)	25
108 Cong. Rec. 14766 (1962)	24
108 Cong. Rec. 14752 (1962)	24
108 Cong. Rec. 14751 (1962)	22
Miscellaneous:	
ABA Section of Antitrust Law, *Report on a Proposed Amendment of the Clayton Act to Permit Contribution* (1979), *in* 936 Antitrust & Trade Reg. Rep. (BNA) E-1 (October 25, 1979)	12
18 Am. Jur. 2d *Contribution* § 50 (1965)	47
3 Moore, *Federal Practice* (2d ed. 1979)	46,49
Prosser, *Law of Torts* § 50 (4th ed. 1971)	12,13, 45,46, 47
Restatement (Second), Torts § 886A (1979)	11,12, 20,45

	Page
Schlei & Grossman, *Employment Discrimination Law* (1976)	20,32
Uniform Contribution Among Tortfeasors Act, 12 U.L.A. 57 (1975)	47
U.S. Department of Labor, Bureau of Labor Statistics, *Directory of National Unions and Employee Associations 1977* (1979) (Bulletin No. 2044)	37,44
U.S. Department of Labor, Labor Management Services Administration, *Union Financial Statistics 1976*	45
Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702 (1980)	20,37
Note, *Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View*, 87 Yale L. J. 1378 (1978)	28

IN THE

Supreme Court of the United States

October Term, 1980

No. 79-1056

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,
AND
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF NORTHWEST AIRLINES, INC.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. D) is reported at 606 F.2d 1350 (D.C. Cir. 1979) and the opinion of the district court (Pet. App. B) at 82 Lab. Cas. ¶33,549 and 14 E.P.D. ¶7730 (D.D.C. 1977).

JURISDICTION

The judgment of the court of appeals (Pet. App. G), superseding an earlier order (Pet. App. E), was entered on October 5, 1979, and a timely petition for rehearing was denied on October 9, 1979 (Pet. App. H). A timely

petition for certiorari was filed on January 4, 1980. Certiorari was granted on June 16, 1980. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The pertinent provisions of the statutes involved, the Equal Pay Act of 1963, 29 U.S.C. §§ 206(d), 216(a)-(d), 217, and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, are set forth in Appendix A to the petition for certiorari.

STATEMENT

This case arises from the efforts of Northwest Airlines, Inc., to obtain contribution from two labor unions for part of the backpay assessed against Northwest in an employment discrimination suit brought by a class of Northwest's cabin attendants, *Laffey v. Northwest Airlines, Inc.*[1] As alleged in Northwest's complaint against the unions, a large part of the backpay award is directly attributable to an employment practice for which the respondent unions, which represented the cabin attendants during the backpay period, were at least partially responsible.[2]

A. The Underlying Employment Discrimination Claim Concerning The Pay Differential.

The original class action against Northwest was commenced in 1970 by 40 women cabin attendants. They challenged, among other things, the wage scale for cabin

---

[1] 366 F. Supp. 763 (D.D.C. 1973) and 374 F. Supp. 1382 (D.D.C. 1974), *aff'd in part, vacated in part and remanded*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

[2] These allegations must be accepted as true, since the case comes before this Court on the unions' motions to dismiss. *See Scheuer v. Rhodes*, 416 U.S. 232, 236-37 (1974). The findings of the district court in the underlying class action are cited when relevant to provide background.

attendants as established in collective bargaining. Under the collective bargaining agreements in force during the prior 20 years, one classification of cabin attendants—purser—received a higher rank and rate of pay than cabin attendants in the other two classifications—stewardess and flight service attendant ("FSA").

The higher pay and rank of pursers under the collective bargaining agreements reflected the pursers' extra duties and supervisory responsibilities. Modeled on the purser position in maritime service, Northwest's pursers were assigned primarily to international flights and were given specific supervisory duties involving international documentation and the handling of aircraft cargo, in addition to overall responsibility for service to passengers in the cabin. 366 F. Supp. at 766 (¶11), 783-785 (¶¶61-63).

Pursers constituted about five percent of the total number of cabin attendants flying for Northwest. 366 F. Supp. at 767 (¶¶18-20). This small, specialized group was greatly outnumbered by the other cabin attendants, the stewardesses and FSAs, who were equal in rank and were paid on the same wage scale, lower than that of pursers. In accordance with the maritime tradition, Northwest's purser complement was limited to men from the time the position was created in 1947 until shortly after Title VII took effect, when a new contract was signed in 1966. At the time suit was filed, however, almost all pursers were men and most of the lower paid cabin attendants were women.

The stewardesses attacked the pay differential between pursers and the lower-ranking cabin attendant positions, alleging that all cabin attendants actually performed "equal" work and that by paying stewardesses less than male pursers, Northwest was discriminating against stewardesses on the basis of sex, in violation of the Equal Pay Act of 1963 and the sex-discrimination provisions of Title VII of the Civil Rights Act of 1964.

B. The Participation Of The Unions In Establishing And Maintaining The Pay Differential.

Respondent TWU was the certified bargaining representative for all Northwest cabin attendants from 1961 until September 1971. At that time, respondent ALPA was certified to replace TWU (JA 16-17 ¶5). The pay differential between pursers, on the one hand, and FSAs and stewardesses, on the other, had been established and preserved during the entire period through collective bargaining, with the active participation of these unions (JA 17-18 ¶6).

The service of the *Laffey* complaint upon Northwest in 1970 was the first indication Northwest had that anyone viewed all Northwest cabin attendant positions as involving "equal" work and as entitling all cabin attendants to the higher salaries established as reasonable for the five percent who served as pursers. As the district court in *Laffey* ultimately found, neither TWU nor any individual cabin attendant had made such an allegation to Northwest prior to the commencement of the suit. 374 F. Supp. at 1390. The court expressly found that Northwest had reasonable grounds for its belief that the purser position was not equal to the other cabin attendant jobs. These grounds included not only the traditional practice by Northwest and other international airlines but also "the acquiescence of the stewardesses' bargaining representative in this arrangement . . . ." *Id.*

The unions' role in perpetuating the differential was more than mere acquiescence. Collective bargaining agreements between Northwest and each respondent union defined the duties of each classification of cabin attendant. These definitional provisions in the contracts were examined and revised periodically in collective bargaining; they expressly assigned to the purser the extra responsibilities not borne by the other cabin attendants. 366 F. Supp. at 766 (¶¶10-12). Accordingly, reflec-

ting what was believed to be the pursers' additional responsibilities, each collective bargaining agreement during the period perpetuated the pay differential. The differentials were "demanded" by each union as an "integral part of the collective bargaining negotiations," and each succeeding contract signed by Northwest and the unions—even after the *Laffey* suit was filed—defined the existence and amount of the pursers' entitlement to greater compensation (JA 17-18 ¶6).

The bargaining position of the incumbent cabin attendants' union on the pursers' entitlement to higher pay never wavered. It persisted even after the entire airline industry became sensitized to the demands of the new federal employment discrimination statutes. For example, in the negotiations leading to the 1967 contract, TWU, whose membership was overwhelmingly female, successfully pressed for a contract change allowing women to be promoted to purser. But TWU never once suggested that the purser position was "equal" to the other cabin attendant positions and that the pay differential should therefore be eliminated. On the contrary, the union demanded continuation of the differential (JA 17-18 ¶6). *See* 366 F. Supp. at 765-766 (¶8), 767-768 (¶23). The contract negotiated by ALPA and signed in December 1972, in the midst of the *Laffey* trial, preserved the pay differential between pursers and stewardesses—although not as large as ALPA had demanded.

The plaintiffs in *Laffey* sued only Northwest. The failure of the class action plaintiffs to assert any monetary claims against TWU, the incumbent union at the time the complaint was filed, was not surprising, since the lead plaintiff in *Laffey* had been a member of the union bargaining committee that had negotiated one of the contracts perpetuating the differential. In March 1972, after ALPA replaced TWU as the incumbent bargaining agent, ALPA was brought into the case by the plaintiffs as

a non-aligned party. This step was taken solely to effectuate any prospective relief that might require departures from the collective bargaining contract; the plaintiffs sought no backpay from ALPA.

C. The Determination Of Northwest's Liability.

Following trial, the district court in November 1973 determined that the contractually defined differences between the pursers and the other cabin attendants were legally insufficient to justify the wage differentials established through collective bargaining. As a result, the district court concluded that the pay differential constituted sex discrimination in violation of Title VII and the Equal Pay Act. An injunctive decree awarding backpay and other relief to stewardesses was entered against Northwest in April 1974, and a judgment was filed in May of that year.

If the determination that the differential violated Title VII and the Equal Pay Act survives Northwest's pending challenges, Northwest will be obligated to pay several thousand stewardesses backpay based on the amounts that they would have earned if they had been pursers—backpay over and above the wages that were the agreed-upon, collectively bargained compensation for both men and women who were not pursers. The award in favor of the class on this claim is presently calculated at $37,000,000, making it one of the largest awards, perhaps the largest, in any employment discrimination case.

D. The Efforts To Obtain Contribution.

Northwest's contribution claim against TWU and ALPA is an effort to allocate to the unions their fair share of that portion of the backpay award attributable to the collectively bargained purser pay differential. Northwest first sought to assert its contribution claim in the *Laffey* case. In May 1974, eight days after the entry of judgment

holding Northwest liable for the backpay, Northwest sought to assert a cross-claim against ALPA and a third-party claim against TWU (JA 18-19 ¶¶7-8). The district court declined to permit Northwest to assert the claims.

In February 1975, while Northwest was appealing that ruling in *Laffey* as well as the adverse determination on the merits, it filed the present, separate suit against both unions, seeking a declaratory judgment that the unions would be liable for a fair portion of any backpay for which Northwest might finally be held liable on account of the purser pay differential.[3] In response to the unions' motion to dismiss the contribution suit, the district court held that Northwest may seek contribution for amounts awarded under Title VII, but not for amounts awarded pursuant to the Equal Pay Act (Pet. App. B and C).

Cross-appeals were permitted (JA 46-51). The court of appeals agreed with the district court that contribution is not available with respect to amounts awarded under the Equal Pay Act. The court also vacated the district court's ruling that contribution is available under Title VII, and remanded the case to the district court to consider whether Northwest's claim for contribution is barred by laches because Northwest had not immediately impleaded the unions in the *Laffey* case (Pet. App. D and G). Northwest then sought review by this Court.

SUMMARY OF ARGUMENT

I

A. Contribution is an equitable remedy that apportions an injured party's recovery among all persons who are responsible for having caused the injury, even when not all are sued by the injured party. In accordance with

[3] In 1976 the court of appeals upheld the district court's refusal to allow assertion of the contribution claim in the *Laffey* case. 567 F.2d at 476-78.

the prevailing American rule in favor of contribution, this Court and lower federal courts have properly recognized contribution for federally created liability in a variety of settings.

B. Under both the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964, there exists the basic prerequisite for contribution between employer and union for employment discrimination liability. Both statutes equally prohibit unions and employers from engaging in discriminatory practices and impose monetary liability on each when their practices cause injury. Congress understood that unions sometimes cause employment discrimination, and independent liability for union-caused discrimination was viewed as essential to the legislative schemes. Union financial liability for causing wage discrimination is clear under the terms and history of both Title VII and the Equal Pay Act, and under a union's duty of fair representation.

When an employer or union alone is sued for a discriminatory practice in which both are implicated, contribution should be available to allocate to each its fair share of the underlying monetary liability. Recognition of this remedy creates no new liability or right of action, but merely allows apportionment of liability among all the parties intended by Congress to bear it.

Congress intended that the realistic threat of backpay liability would serve as the principal "spur or catalyst" for eliminating discrimination in employment. Permitting apportionment of liability will strengthen the deterrent effect of the prohibition against discrimination. Denial of contribution, by contrast, would virtually eliminate any practical incentive for unions to retreat from discriminatory wage scales that benefit favored groups of employees. It would permit unions to escape their statutory liability by inducing the victimized groups to seek compensation from employers alone.

Contribution will also promote even-handed application of laws that make both unions and employers liable for discriminatory acts. Denial of contribution would unfairly foist upon employers the full burden of compensating victims of discrimination for injuries for which unions are also responsible. In light of these principles and practicalities, the lower federal courts have allowed contribution in the overwhelming preponderance of employment discrimination cases.

Fears conjured up by unions that allowing contribution would cause problems in managing employment discrimination cases are unfounded. Contribution would not unduly complicate employment discrimination litigation, whether the claim is asserted in the suit brought by the injured employees or, as here, in a separate suit by the employer. The federal courts have ample tools to manage these cases, as they have already demonstrated.

Nor will contribution expose unions to unjust, staggering assessments. Contribution, after all, only allocates shares of liability that Congress has seen fit to impose. Moreover, in the typical collective bargaining relationship, the national union may be financially stronger than the employer with whom it is negotiating. The two unions involved in this case are large and financially secure, with multi-million dollar annual incomes. Since contribution is an equitable remedy, the federal courts possess the flexibility to tailor the remedy in any case in which a union's "fair share" of the liability might exceed its ability to pay. A blanket rule shielding unions entirely from the exposure created by Congress, therefore, would be unwarranted.

II

A. Northwest did not engage in "unreasonable delay" by awaiting the district court's ruling on the employees' claims against it before asserting a contribution claim

against the unions. Traditionally, a contribution claim has been asserted by a separate lawsuit after the party seeking contribution has actually paid a judgment in favor of the injured party, since the contribution claim technically does not arise until then. More recently, some courts have permitted assertion of a contingent claim for contribution by cross-claim or third-party claim in the main action. But the anticipatory assertion of a contingent claim has never been mandatory. A defendant may reasonably await at least the initial determination of his own liability before being required to begin litigation over the ultimate allocation of a part of that liability.

B. Nothing in Title VII requires an employer to implead the union immediately in the employees' underlying suit or to refer a contribution request to the EEOC for conciliation. No court has ever imposed either condition to the assertion of a contribution claim under Title VII. Conciliation under Title VII is purely permissive, even for the employees' underlying charge. Nothing more can be demanded from an employer who seeks to assert a federal common law right, not a claim under Title VII itself.

C. The decision by the *Laffey* plaintiffs not to file an EEOC charge against the unions is no bar to a separate contribution suit. The employer's contribution claim has an independent life that turns on the existence of common liability for an injury, even if, through lapse of time or other procedural default, the injured employees have lost their right to enforce that liability directly against a responsible party. A major purpose of contribution is to remove from plaintiffs the power to control the ultimate apportionment of liability if, as in this type of case, equity demands that other parties responsible for the injury share the liability that is assessed.

ARGUMENT

I. AN EMPLOYER SHOULD BE ALLOWED TO OBTAIN CONTRIBUTION FROM A UNION FOR LIABILITY BASED ON A VIOLATION OF THE FEDERAL EMPLOYMENT DISCRIMINATION LAWS WHEN BOTH THE EMPLOYER AND THE UNION ARE RESPONSIBLE FOR THE DISCRIMINATORY PRACTICE.

It is important to place in perspective what this case involves and what it does not. Northwest is not inviting the Court to create any financial liability for unions beyond the liability to which Congress has already subjected them. Nor is this a case that requires the creation of implied rights of action to enforce federal statutes. Those rights already exist under the terms of the statutes and under other related doctrines. The simple issue is whether the Court agrees, as most lower courts have, that the developing law of remedies warrants recognition of a claim for equitable contribution among parties who already share legal and factual responsibility for a violation of federal employment discrimination laws.

A. The Federal Courts Have Joined State Courts In Recognizing The Equitable Propriety of Contribution.

Contribution is an equitable remedy that permits the apportionment of an injured party's recovery among all the persons who are legally responsible for the injury, even when the injured party has not sued or obtained a judgment against all of them. *Restatement (Second), Torts* § 886A(1) (1979). The rationale for contribution is grounded in fairness. It is inherently unjust in most circumstances to single out one party to bear the entire burden of liability when others are also responsible for causing the harm, perhaps more responsible. The original common law rule placed the entire burden of compensation for a jointly caused injury on whomever the

plaintiff happened to sue. As Justice Brennan observed, writing for the New Jersey Supreme Court in 1954, the "harshness of the rule" exposed it to "vigorous denunciation" because of its "obvious lack of sense and justice . . . ." *Judson v. Peoples Bank & Trust Co.*, 17 N.J. 67, 88, 110 A.2d 24, 34 (1954). *See, e.g.*, Prosser, *Law of Torts* § 50, at 307 (4th ed. 1971).

Recognizing this principle, courts today generally allow contribution under a variety of circumstances. Over the last five decades, 41 states and the District of Columbia have rejected the common law rule and have adopted contribution as a general principle of the law of remedies. The new *Torts Restatement* declares that contribution is now the prevailing American rule. *See* § 886A.[4]

The federal courts, of course, have the power in federal cases to replace an "ancient rule of common law" with "present day standards of wisdom and justice." *Funk v. United States*, 290 U.S. 371, 382 (1933). This Court has time and again recognized the power of the federal judiciary to supplement express remedies in order to advance the purposes of the underlying federal law.[5]

---

[4] Appendix A lists the states that now recognize the right of contribution as a general principle of law.

For other expressions of the steady march of contribution, *see, e.g., Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 718 (2d Cir. 1978) (Friendly, J.); *Globus, Inc. v. Law Research Service, Inc.*, 318 F. Supp. 955, 957-58 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971); *Restatement (Second), Torts* § 886A, comment a, at 338. *See also* ABA Section of Antitrust Law, *Report on a Proposed Amendment of the Clayton Act to Permit Contribution* (1979), *in* 936 Antitrust & Trade Reg. Rep. (BNA) E-1 (October 25, 1979).

[5] *E.g., Illinois v. Milwaukee*, 406 U.S. 91 (1972); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971); *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967); *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960); *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957); *see also Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969).

Implementing this power, this Court and the lower federal courts have permitted contribution among persons who share potential liability for the same injury, so long as equitable apportionment is consistent with the federal law creating the underlying liability. *See, e.g., Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974); *Glus v. G. C. Murphy Co.*, 23 F.E.P. Cas. 86 (3d Cir. 1980) (Higginbotham, J.).

Although contribution is an equitable remedy, it is not limited to apportionment of liability for an underlying claim founded in equity. Nevertheless, the judicial power to recognize contribution must be at its zenith where the underlying claim is itself equitable, as is a claim for backpay under Title VII, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975); *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 718-19 (1978), and where Congress has assigned "plenary" remedial powers to implement the statutes to the federal courts. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974).

The accepted principles of contribution require only two elements: (1) that wrongdoers have common liability to the injured party, and (2) that the party seeking contribution would otherwise pay more than his fair share. *See* Prosser, *Law of Torts* § 50 (4th ed. 1971). These were the principles applied in this Court's leading case on contribution, *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc., supra*, 417 U.S. 106. There, in permitting a ship owner to obtain contribution against another tortfeasor responsible for a longshoreman's injuries, the Court explained that allowing contribution would produce a "more equal distribution of justice" than a no-contribution rule, *id.* at 111. In addition, this Court emphasized that contribution would advance the important interest of safety inherent in federal admiralty law, since apportioning an equitable share of damages among all parties at fault would encourage all parties to exercise care.

Outside the admiralty context, this Court has approved contribution unless the wrongdoer from whom contribution is sought was, for some special reason, never subject to liability for the amounts claimed. *Compare, e.g., United States v. Yellow Cab Co.*, 340 U.S. 543 (1951) (contribution allowed against United States when potentially liable to original plaintiff under Federal Tort Claims Act), *with Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977) (indemnity claim against government not allowed where sovereign immunity would have barred suit by original plaintiff).[6]

In the lower federal courts, contribution among all parties who are legally responsible for the injury has been routinely permitted in a variety of contexts.[7] Federal law

---

[6] In *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), the Court refused to allow contribution where the would-be contributor's liability to the injured party had been abrogated and replaced by a workman's compensation insurance system. The traditional rule under state law is that responsibility for workman's compensation does not constitute common liability for purposes of contribution. *E.g., Bertone v. Turco Products, Inc.*, 252 F.2d 726 (3d Cir. 1958)(New Jersey law); *Mahone v. McGraw-Edison Co.*, 281 F. Supp. 582 (E.D. Va. 1968)(Virginia law); *Iowa Power & Light Co. v. Abild Constr. Co.*, 259 Iowa 314, 144 N.W.2d 303 (1966); *Hunsucker v. High Point Bending & Chair Co.*, 237 N.C. 559, 75 S.E.2d 768 (1953).

The opinion in *Cooper Stevedoring, supra*, 417 U.S. at 112, explains the special facts that led to the disallowance of contribution in *Halcyon Lines*.

[7] For example, in *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975), the court held that a contribution right exists under federal common law in a case arising from a mid-air collision. The court fashioned such a rule because it is more just and because it fosters congressional intent and federal policies evidenced in the Federal Aviation Act, 49 U.S.C. §§ 1301 *et seq.*

(footnote continued on following page)

rarely grants special immunity to one of two parties who jointly inflict injury. Only in a few cases have the courts refused to allow apportionment of damages among all persons potentially liable for the harm, and those rare decisions have been based upon a clear interference with the policies of the law creating the underlying liability. For example, in the antitrust context, some courts have concluded that allowing contribution would defeat the deterrent effect of private actions to enforce the antitrust laws.[8] This issue is before the Court in *Westvaco Corp. v. Adams Extract Co.*, No. 79-972.

Whether or not that view of contribution is correct in the antitrust context, there is no collision between the equitable principle of contribution and the purposes of the federal employment discrimination laws. Not only will contribution not undermine the enforcement of the underlying laws, it will actually promote compliance with the command to eradicate employment discrimination. Accordingly, the general rule favoring contribution should be applied here.

(footnote continued from preceding page)

Other federal courts have fashioned contribution remedies in other contexts as well. *See, e.g., Heizer Corp. v. Ross*, 601 F.2d 330 (7th Cir. 1979); *Gomes v. Brodhurst*, 394 F.2d 465 (3d Cir. 1968); *George's Radio, Inc. v. Capital Transit Co.*, 126 F.2d 219 (D.C. Cir. 1942); *Wassel v. Eglowsky*, 399 F. Supp. 1330 (D. Md. 1975), *aff'd*, 542 F.2d 1235 (4th Cir. 1976); *Gould v. American-Hawaiian Steamship Co.*, 387 F. Supp. 163 (D. Del. 1974), *vacated and remanded on other grounds*, 535 F.2d 761 (3d Cir. 1976); *Globus, Inc. v. Law Research Service, Inc., supra*, 318 F. Supp. 955.

[8] *E.g., Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*, 604 F.2d 897, 902-03 (5th Cir. 1979), *petition for cert. pending sub nom. Texas Industries, Inc. v. Radcliff Materials, Inc.*, No. 79-1144 (filed Jan. 24, 1980) (48 U.S.L.W. 3570). *Contra, Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979) (allowing antitrust contribution because of contrary conclusion).

B. Contribution Should Be Permitted From Unions Under The Federal Employment Discrimination Laws.

The federal employment discrimination laws impose duties on both employers and unions, and both employers and unions bear monetary liability for breach of those duties. Since a labor union that participates in a violation of the federal employment discrimination laws bears liability for that conduct, the general rule favoring contribution should apply. An employer like Northwest that alone is sued for a joint employment practice should be allowed to seek from the union its fair share of the recovery obtained by the injured employees.

We first discuss the fundamental predicate for contribution: the existence of independent union liability for conduct violating Title VII and the Equal Pay Act, the two statutes that were the basis for imposing backpay liability upon Northwest in the *Laffey* case. Then we explain why contribution will measurably promote the objectives of those statutes.

1. Unions bear equal responsibility for Title VII violations.

Title VII expressly makes it unlawful for a union to engage in discriminatory practices, including activity to "cause or attempt to cause an employer to discriminate" on the basis of race, sex, religion or national origin. Section 703(c)(3), 42 U.S.C. § 2000e-2(c)(3). A victim of union-caused or union-assisted discrimination may bring an action against the union. Section 706(f), 42 U.S.C. § 2000e-5(f). The court in a Title VII action may "order . . . back pay (payable by the employer . . . *or labor organization*, as the case may be, responsible for the unlawful employment practice) . . . ." Section 706(g), 42 U.S.C. § 2000e-5(g) (emphasis added).

Nor was the imposition of liability on unions for causing or joining Title VII violations a mere after-

thought. As this Court has noted, Congress modeled the backpay provisions of Title VII on Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 106(c). *See Albemarle Paper Co. v. Moody, supra*, 422 U.S. at 419. Backpay awards against unions under Section 10(c) had been a basic feature of federal labor relations law for many years by the time Title VII was crafted.[9]

The legislative history of Title VII shows that Congress recognized the critical importance of placing unions under an independent and meaningful duty to combat discrimination. Their failure to honor this independent duty was meant to subject unions to precisely the same monetary sanctions that are applicable to employers.[10]

Congress enacted the union liability provision of Title VII against the backdrop of three years of hearings that presented a consistent theme that unions themselves discriminate and contribute significantly to discrimination by employers.[11] In those hearings, Congress

---

[9] *See, e.g., Radio Officers v. NLRB*, 347 U.S. 17 (1954); *NLRB v. Gottfried Baking Co.*, 210 F.2d 772 (2d Cir. 1954) (to award backpay against union under § 10(c) of the NLRA, it is sufficient that union signed unlawful collective bargaining agreement); *NLRB v. Alaska S.S. Co.*, 211 F.2d 357 (9th Cir. 1954) (same).

See In re Newman, 85 N.L.R.B. 725 (1949) (announcing rule of joint and several backpay liability for unions and employers). The rule was upheld in *Union Starch & Ref. Co. v. NLRB*, 186 F.2d 1008, 1014 (7th Cir.), *cert. denied*, 342 U.S. 815 (1951).

[10] *See, e.g.*, H.R. Rep. No. 914, 88th Cong., 1st Sess. 29 (1963); 110 Cong. Rec. 13169, 13170-13171 (1964) (remarks of Sen. Byrd); *id.* at 7207, 7209 (Justice Department memorandum introduced by Sen. Clark).

[11] *See, e.g., Hearings on Proposed Federal Legislation to Prohibit Discrimination in Employment Before the Special Subcomm. on Labor of the House Education & Labor Comm.*, Part 1, 87th Cong., 1st Sess. (1961) (hereafter "*Powell Committee Hearings, Pt. 1*"); *Hearings on Proposed Federal Legislation to Prohibit Discrimination in Employment Before the Special Subcomm.*

(footnote continued on following page)

heard extensive testimony about "widespread" union discrimination.[12] Union culpability was exposed by civil rights leaders like Herbert Hill and A. Philip Randolph and confirmed by nationally prominent labor leaders like George Meany and Walter Reuther, who readily admitted union discrimination.[13] Those labor leaders recognized that

---

(footnote continued from preceding page)

on Labor of the House Education & Labor Comm., Part 2, 87th Cong., 2d Sess. (1962) (hereafter "*Powell Committee Hearings, Pt. 2*"); *Hearings on H.R. 405 and Similar Bills to Prohibit Discrimination in Employment Before the General Subcomm. on Labor of the House Education & Labor Comm.*, 88th Cong., 1st Sess. (1963) (hereafter "*H.R. 405 Hearings*"); *Hearings on Civil Rights Before Subcomm. No. 5 of the House Judiciary Comm.*, Serial No. 4, 88th Cong., 1st Sess. (1963) (hereafter "*Judiciary Hearings*").

[12] H.R. Rep. No. 570, 88th Cong., 1st Sess. 2 (1963).

[13] *See, e.g., Powell Committee Hearings, Pt. 2*, at 719-37, where Herbert Hill, Labor Secretary of the NAACP, explained how organized labor often "enters into collusive practices with management to codify discriminatory employment practices into collective bargaining agreements." *See also H.R. 405 Hearings*, at 144-47. Similar observations were made by Rev. Richard Hillenbrand of the New York City NAACP. *H.R. 405 Hearings* at 27-30.

Powell Committee Hearings, Pt. 2, at 798-801 (Regional NAACP Director Clarence Laws: one of the "four main forces in the United States which mitigate against minority groups enjoying equal and fair opportunity at employment" is "discrimination by labor unions"); *H.R. 405 Hearings* at 408-09 (D.C. Advisory Committee to the U.S. Comm'n on Civil Rights: "discriminatory practices of local unions are as pernicious a barrier to Negro employment as are the practices of employers").

Powell Committee Hearings, Pt. 2, at 851-53 (A. Philip Randolph, National President of the Negro American Labor Council); *id.* at 993, 1002-05 (George Meany, President of the AFL-CIO); *id.* at 1009-10 (IUE Int'l Secretary-Treasurer Hartnett); *Judiciary Hearings*, at 1791 (Meany); *id.* at 2060 (Teamsters Legislative Counsel Zagri); *id.* at 1944 (UAW President Reuther).

(footnote continued on following page)

"the labor movement has failed to measure up to its responsibility" to end discrimination,[14] and that often "discrimination is jointly perpetrated and perpetuated by unions and employers." *H.R. 405 Hearings*, at 66 (IUE President Carey). Indeed, representatives of labor *insisted* that, in order to be effective, an employment discrimination law had to contain strong sanctions that would apply equally to unions as well as employers. As Walter Reuther stated to the House Judiciary Committee, "if a union discriminates, there ought to be a penalty. . . . and the penalty is the thing that will facilitate and accelerate progress." *Judiciary Hearings*, at 1944.[15]

The product of this testimony was the ban on union-caused discrimination in Section 703(c)(3) and the imposition of union backpay liability under Section 706(f) and

---

(footnote continued from preceding page)

Powell Committee Hearings, Pt. 1, at 158 (Report of the U.S. Commission on Civil Rights); *id.* at 165 (UAW Vice President Greathouse); *see* numerous similar statements by other labor leaders, *id.* at 214-18, 392, 658, and by Congressmen, *id.* at 164, 221, 504; *H.R. 405 Hearings* at 21.

[14] *Powell Committee Hearings, Pt. 1*, at 214 (Trade Union Leadership Council Vice President Sheffield); *see also id.* at 240 (Chicago Chapter, Negro-American Labor Council Secretary-Treasurer Abner).

[15] *See Powell Committee Hearings, Pt. 2*, at 1002 (George Meany: legislation will be effective only if it has enough "teeth" in it); *id.* at 1009-10 (statement of IUE Secretary-Treasurer Hartnett: there must be strong "impartial" enforcement and stringent penalties "for any violator, be he management, labor, or anything else"); *Judiciary Hearings*, at 1791-94 (George Meany: "the guilty employer should be punished to the same extent as the guilty union"); *H.R. 405 Hearings*, at 66-72 (IUE President Carey: the law should apply to unions as well as employers). *See also Powell Committee Hearings, Pt. 1*, at 651 (New York State Assistant Attorney General Siegel: one reason for ineffectiveness of New York fair employment law was "relative immunity of the unions").

(g). Pressing the congressional attack upon union-caused or union-aided discrimination, the federal courts have held unions liable for backpay under Title VII even for a relatively passive role in signing or administering collective bargaining agreements that cause unlawful discrimination. Union backpay liability has been even more clear where, as in this case, the unions were instrumental in the negotiation and perpetuation of the offending contract provision.[16]

---

[16] The most recent commentary on this issue concludes that, "regardless of its precontract negotiating efforts, a union violates Title VII when it signs a collective bargaining agreement which discriminates in operation." Note, *Union Liability For Employer Discrimination*, 93 Harv. L. Rev. 702 (1980) (hereafter "*Union Liability*").

See, e.g., Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374, 1389 (5th Cir. 1978), *cert. denied*, 441 U.S. 968 (1979); *Donnell v. General Motors Corp.*, 576 F.2d 1292, 1300 (8th Cir. 1978); *Denicola v. G. C. Murphy Co.*, 562 F.2d 889, 892 (3d Cir. 1977) (sex discrimination in contract wage rates); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 270-71 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); *Sears v. Atchison, T. & S. F. Ry.*, 454 F. Supp. 158, 180 (D. Kan. 1978); *Farmer v. Hotel Workers Local 1064*, 19 E.P.D. ¶9075, 99 L.R.R.M. 2166 (E.D. Mich. 1979). (job classification and wage scales that discriminated against women); *Chrapliwy v. Uniroyal, Inc.*, 458 F. Supp. 252, 260-61 (N.D. Ind. 1977) (sexually discriminatory contract language); *Dickerson v. United States Steel Corp.*, 439 F. Supp. 55, 62-63, 80 (E.D. Pa. 1977), *additional opinion*, 472 F. Supp. 1304 (E.D. Pa. 1978), *vacated and remanded on other grounds*, 616 F.2d 698 (3d Cir. 1980); *Stevenson v. International Paper Co.*, 432 F. Supp. 390, 398 (W.D. La. 1977).

See generally Schlei & Grossman, *Employment Discrimination Law* 560 (1976). *Cf. Restatement (Second), Torts* § 876, comment b & illustration 4, § 879 & comment a (one who encourages or assists another to commit a tort, is himself a tortfeasor and responsible for the consequences of the other's acts).

Under these principles, both TWU and ALPA are subject to backpay liability for the allegedly discriminatory pay differential that they regularly "demanded" and that was "an integral part of the collective bargaining negotiations and of all contracts entered into and implemented" between Northwest and the unions (JA 17, ¶6). There is no doubt, therefore, that Northwest has satisfied the basic predicate of a claim for contribution of a part of the Title VII backpay award in *Laffey*.

2. Unions are subject to independent monetary liability for causing violations of the Equal Pay Act.

A similar result follows for an employer's liability under the Equal Pay Act when a union violates its own statutory duty under that Act not to cause the employer to pay unequal wages for equal work. Since the union would bear monetary liability for its breach if sued, it must respond in contribution if only the employer is sued.

The Equal Pay Act is addressed specifically to wage discrimination "on the basis of sex." 29 U.S.C. § 206(d)(1). Like Title VII, the Equal Pay Act prohibitions apply equally to employers and unions. Under § 206(d)(2), it is unlawful for any "labor organization" to "cause or attempt to cause" an employer "to discriminate against an employee" on the basis of sex by paying unequal wages for equal work.

The court below, in denying contribution for Equal Pay Act liability, focused on only one feature of the Equal Pay Act, which the court thought dispositive: the apparent absence of an express right under that statute for injured employees to recover backpay from unions violating the Act. That "omission," the court of appeals concluded, "insulates unions from suits by employees." The court then reasoned that what it viewed as a "statutory protection" of unions would be frustrated by allowing contribution (Pet. App. 9d). That analysis suffers from two fundamental flaws.

First, the Equal Pay Act itself expresses no purpose to give unions "statutory protection" from monetary liability. The Act expressly subjects unions to backpay suits by the government on behalf of the deprived employees. In addition, the legislative history of the Act convincingly demonstrates that Congress assumed that there would be effective damage remedies by employees against unions for union-caused violations.

Second, entirely apart from the remedies under the Equal Pay Act itself, separate elements of federal employment discrimination law unequivocally impose monetary liability on unions that cause wage discrimination on the basis of sex in violation of that Act. That common liability for an injury—even if the remedy is supplied by a different statute or separate legal doctrine—is a sufficent predicate for an employer's claim for contribution for a portion of the liability imposed on it under the Equal Pay Act.

(a) Union liability directly under the Act.

When Congress made it unlawful for a union to cause an employer to engage in sex-based wage discrimination in violation of the Equal Pay Act, Congress intended to make "labor unions accountable and responsible for their part" in wage discrimination against women. 108 Cong. Rec. 14751 (1962) (Rep. Griffin). This accountability includes full financial liability.

1. The Act expressly makes unions subject to monetary liability for discriminatory wage scales that they procure. Congress provided explicitly for suits by the Secretary of Labor that would cover unions as well as employers. 29 U.S.C. §§ 216(c), 206(d)(3). *See also* Reorganization Plan No. 1 of 1978, § 1, 43 Fed. Reg. 19807 (1978) (transferring Equal Pay Act enforcement to the EEOC). These suits are brought "on behalf of" the injured employees, and any recovery obtained "shall be paid . . . directly to the employee or employees affected."

The government has successfully invoked this authority to recover damages from a union that violated the Equal Pay Act, and has convinced the lower courts in the context of Section 216(c) actions that unions and employers are "jointly and severally liable" for backpay under this Act. *Hodgson v. Sagner, Inc.*, 326 F. Supp. 371, 374 (D. Md. 1971), *aff'd*, 462 F.2d 180 (4th Cir. 1972); *see Dunlop v. Beloit College*, 411 F. Supp. 398, 402 (W.D. Wis. 1976). Even the court below agreed that unions are liable for backpay in suits brought by the government under the Equal Pay Act (Pet. App. 7d, 9d, 11d). This express liability destroys any contention that Congress intended unions to enjoy a special immunity from the consequences of their own violations of the Act.

2. Moreover, although the Act as ultimately passed in 1963 contained no section explicitly providing for injured employees to sue unions for violating the Act, this omission does not manifest any congressional purpose to absolve unions of monetary liability. As the United States and the EEOC stated in their *amici* brief to this Court at the petition stage:

> "There is much to suggest that Congress intended that unions would be covered by the [Equal] Pay Act and held accountable under it in the same manner and to the same extent as employers." Brief for the United States and the EEOC as Amici Curiae, p. 7.

That is an understatement. The legislative history of the Equal Pay Act persuasively demonstrates that Congress believed the courts would require unions to shoulder equal financial responsibility for their violations. It is worth recalling that the Act was passed at a time when, as Congress understood, there was a judicial willingness "to provide such remedies as are necessary to make effective the congressional purpose." *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964). *See Cannon v. University of Chicago*, 441

U.S. 677, 696-700 (1979). At that time Congress "tended to rely to a large extent on the courts" to infer the pertinent remedies. *Id.* at 718 (Rehnquist, J., concurring).

Congressional intent to allow employees to sue unions for violating the Equal Pay Act emerges unmistakably from the legislative history. The forerunner of the Act that was passed in 1963 was a 1962 "equal pay" bill, H.R. 11677, that passed the House but was not reconciled with a substantially identical Senate-passed bill prior to expiration of that Congress. H.R. 11677 had been amended on the House floor expressly to prohibit unions from causing sex-based wage discrimination. The principal advocate of the amendment explained that it was critical to treat unions equally with employers because "labor organizations . . . are often directly involved in creating the conditions or situations which are discriminatory." 108 Cong. Rec. 14752 (1962) (Rep. Griffin). Representative Zelenko, who offered the amendment to cover unions, added:

> "[T]here is included in the bill a prohibition against the labor unions or organizations that might attempt to coerce or influence or bargain an employer to violate the provisions of this act. *Up to this point, it was the employer that was liable.* But it is thought that, perhaps, in his bargaining activities between labor management and unions, there might come a point where because of the insistence of a labor union, he might be obliged to violate the law as it applies to discrimination regarding the sexes.
>
> ". . .[O]*rganized labor is* in favor of this amendment. They are willing to be placed in this bill and *to be subject to its penalties*, if they are involved in any violation." 108 Cong. Rec. 14766-67 (1962) (emphasis added).

Under the 1962 bill, enforcement would have been assigned exclusively to the Secretary of Labor, who was to be authorized to sue in federal court to have monetary liability assessed against *any* "respondent," a term that was defined to include unions as well as employers. *See* H.R. 11677, 87th Cong., 2d Sess., §§ 4, 6(a), (d) (as passed by the House, July 25, 1962). Thus, no one doubted that unions were to be subject to precisely the same financial liability as were employers.

When an equal pay bill was presented again in 1963, it differed from its predecessor in one respect. The bill's provisions were to be merged into the Fair Labor Standards Act. This was done solely to allay concern that the exclusive government enforcement mechanisms of the 1962 bill would necessarily have created a "new bureaucracy . . . with a new set of investigators and a new set of rules." 109 Cong. Rec. 7223 (1963) (Rep. Thompson). As Representative Frances P. Bolton explained regarding the changes in the 1963 bill:

> "It is a very logical approach to the problem in that it places administration of equal pay under the Fair Labor Standards Act. This alleviates the fear voiced by many that passage of such a bill would lead to the establishment of a new bureaucracy with a new set of rules and a new set of investigators." 109 Cong. Rec. 9193 (1963).

Insertion of the new Act into the FLSA, by contrast, opened up *private* enforcement as well.

By merging the Equal Pay Act provisions into the FLSA, therefore, Congress did not intend to alter the uniform treatment of employers and unions that had been carefully crafted as part of the 1962 bill. As the FLSA stood prior to the insertion of the Equal Pay Act, it addressed only illegal acts by employers, like minimum wage and maximum hour violations, and thus it provided

only for suits against employers. Congress, however, assumed that, when the new Equal Pay Act merged into the FLSA, with a new prohibition against union misconduct, unions as well as employers would become subject equally to all the remedies that had been available to aggrieved employees under the FLSA.

For instance, Representative O'Hara, a member of the subcommittee that had drafted the final bill, stressed that

> "if a labor organization is in any way at fault in maintaining such a discriminatory wage rate, they would be subject to *all the penalties and all the enforcement provisions* provided under the Fair Labor Standards Act." 109 Cong. Rec. 9209 (1963) (emphasis added).

The "penalties and enforcement provisions" include, of course, an employee suit for back wages. 29 U.S.C. § 216(b). Similarly, Representative Thompson declared unequivocally that discrimination made unlawful by the Act could subject "the guilty party"—not just an employer—to liability in a suit by the government or one "*initiated by the employee or the employer* in a Federal district court." 109 Cong. Rec. 9197 (1963) (emphasis added).

These expressions leave no room to believe that Congress intended to insulate unions from monetary liability for causing sex-based wage discrimination. The absence of an explicit authorization for suits by injured victims of union-caused discrimination is no barrier to the recognition of a remedy that was clearly intended. As the Court has recently remarked, the touchstone is always congressional intent, and the intent to allow a private remedy "may appear implicitly in the language of the statute or in the circumstances of its enactment." *Transamerica*

Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18 (1979). That implication is surely not obscure here.[17]

Moreover, it bears emphasis that the Equal Pay Act is a civil rights statute, thus providing the context in which "not only the words and history" of the Act, but also "its

---

[17] Despite the persuasive legislative history and its own prior position, the government suggested at the petition stage that unions may not "fit" into the enforcement scheme of the FLSA. The government noted that wage differentials violating the Equal Pay Act are deemed to constitute "unpaid minimum wages" under the FLSA. From this definition, the government suggested that perhaps only employers "benefit financially" from a violation and that only enforcement against employers was contemplated.

This suggestion stands the legislative history on its head and was expressly rejected—at the government's instance—in *Hodgson v. Sagner, Inc., supra*, 326 F. Supp. at 373. By including sex-based wage differentials as unpaid wages, Congress was simply adopting an expedient device to allow Equal Pay Act enforcement to ride the coattails of FLSA enforcement, not redefining the entire purpose of the Equal Pay Act. Indeed, the EEOC recently urged and obtained rejection of a similar argument by respondent ALPA against union backpay liability under the Age Discrimination in Employment Act, which also picks up FLSA remedies and treats back wages recoverable from unions as "unpaid minimum wages", 29 U.S.C. § 626(b). *EEOC v. Air Line Pilots Ass'n*, 489 F. Supp. 1003 (D. Minn. 1980).

As Congress recognized, it is simply not true that only employers "benefit financially" from unlawful discrimination. As discussed below (pp. 36-37), unions may have an independent incentive to press for unlawful wage differentials, to the advantage of employees of one sex at the expense of employees of the other.

It is important to recall that, a year after passing the Equal Pay Act, the same Congress enacted the Civil Rights Act of 1964, which expressly makes unions liable for "backpay" for causing Title VII violations.

subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination." *Cannon v. University of Chicago, supra*, 441 U.S. at 709.[18] Therefore, employees' suits against unions alleging that the unions caused sex discrimination in wages have a firm foundation in the Equal Pay Act. As the Fifth Circuit explained in entertaining such a suit:

> "[L]abor unions must bear a heavy responsibility in giving effect to the remedial provisions of both Title VII *and the Equal Pay Act.* International unions, along with regional and local unions, *may incur liability for discriminatory effects of contract provisions found in collective bargaining agreements." Sinyard v. Foote & Davies Div. of McCall Corp.*, 577 F.2d 943, 945 (5th Cir. 1978)(emphasis added).[19]

3. Unions, therefore, are exposed to financial liability for violating the Equal Pay Act. Regardless of the identity of the instrument of enforcement of the union's liability to deprived employees, the union's exposure to monetary liability for causing an Equal Pay Act violation establishes the predicate for a contribution claim if only

---

[18] *See generally* Note, *Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View*, 87 Yale L. J. 1378 (1978). Those lower courts that have suggested a contrary conclusion have failed to come to grips with the legislative purpose and history of the Equal Pay Act. *See, e.g., Denicola v. G. C. Murphy Co., supra*, 562 F.2d 889; *Brennan v. Emerald Renovators, Inc.*, 410 F. Supp. 1057 (S.D.N.Y. 1975).

[19] *See also Murphy v. Miller Brewing Co.*, 307 F. Supp. 829, 839 (E.D. Wis. 1969), *aff'd sub nom. Hodgson v. Miller Brewing Co.*, 457 F.2d 221 (7th Cir. 1972), an Equal Pay Act backpay case in which the employer impleaded the unions. The court dismissed the third-party complaint against the unions, but only because the unions had not violated the Act since they had never "proposed the discriminatory provisions" and instead had pressed for wage equalization. Under such a test, TWU and ALPA would have certainly been liable if the stewardesses had sued them directly under the Act.

the employer is sued. Thus, even if the Equal Pay Act stood alone, there would be ample basis—entirely apart from the rest of federal employment discrimination law—for an employer to seek contribution against a union.

(b) Union liability under other doctrines.

Furthermore, in supporting a claim for contribution for injury inflicted by violation of the Equal Pay Act, it is unnecessary to rely solely on the remedies that the Equal Pay Act itself supplies. Rather, the existence of backpay remedies enforceable under other doctrines of federal law for union conduct that causes injury in violation of the Equal Pay Act provides ample basis for an employer's contribution claim. This conclusion follows from the settled principle, recognized in both federal and state law, that "a right of contribution rests upon the common liability of the wrongdoers for the loss notwithstanding the fact that the liability of each wrongdoer may rest on a *different* ground."[20]

Two other sources of federal employment discrimination law create private backpay remedies against unions for conduct that violates the Equal Pay Act. One is Title VII, which comprehends all forms of conduct that violate the Equal Pay Act. The other is the federal common law doctrine making a union liable for damages for breach of its duty of fair representation, a duty that is

---

[20] *Fischbach & Moore International Corp. v. Crane Barge R-14*, 476 F. Supp. 282, 287 (D. Md. 1979) (emphasis added); *accord, e.g., Guillard v. Niagara Machine & Tool Works*, 488 F.2d 20, 22 (8th Cir. 1973); *Hartford Accident & Indemnity Co. v. R. Herschel Mfg. Co.*, 453 F. Supp. 1375, 1379 (D.N.D. 1978); *City of Kingsport v. SCM Corp.*, 429 F. Supp. 96, 100 (E.D. Tenn. 1976); *Cartel Capital Corp. v. Fireco of New Jersey*, 81 N.J. 548, 410 A.2d 674 (1980); *Bundy v. City of New York*, 23 App. Div. 2d 392, 261 N.Y.S.2d 221 (1965).

contravened when a union violates its statutory duty under Section 206(d)(2) and causes an employer to maintain a discriminatory wage scale prohibited by the Equal Pay Act.

1. Closely tracking the terms of the Equal Pay Act, the prohibition applicable to labor unions under Title VII forbids a union "to cause or attempt to cause an employer to discriminate against an individual" in compensation. Section 703(c)(3), 42 U.S.C. § 2000e-2(c)(3). Although the coverage of the Equal Pay Act is somewhat narrower than that of Title VII, the basic purpose of both is the same:

> "Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry . . . ." *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).

Both statutes "serve the same fundamental purpose against discrimination based on sex." *Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 266 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970).

Indeed, Congress went to unusual lengths to harmonize the two acts, providing in the so-called Bennett Amendment, Section 703(h), 42 U.S.C. § 2000e-2(h), that Title VII's coverage of sex discrimination in wages is to be precisely the same as under the Equal Pay Act. *See* 110 Cong. Rec. 13647 (1964)(remarks of Sen. Bennett). As Senator Bennett later explained, his "amendment means that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act." 111 Cong. Rec. 13359 (1965). In applying this legislative congruence, the federal courts have consistently held that the sex discrimination provisions of the two acts "are *in pari materia*" and that any Equal Pay Act violation also transgresses Title VII. *Schultz v. Wheaton Glass Co., supra*, 421 F.2d at 266; *accord, Laffey v. North-*

west Airlines, Inc., supra, 567 F.2d at 445-46; *Ammons v. Zia Co.*, 448 F.2d 117, 119 (10th Cir. 1971).

Thus, a union that violates the Equal Pay Act is necessarily subject to the overlapping remedies available against it under Title VII, including the explicit provision for backpay awards against unions. This exposure provides a legitimate basis for a court of equity to require the union to absorb its fair share of any award against the employer, even if the award is separately calculated under the Equal Pay Act.[21]

Under this principle, the union bears only the proportionate consequences of its own violation of the Equal Pay Act. Any other rule would create an absurd anomaly: Contribution would depend solely upon the particular anti-discrimination statute pleaded by the plaintiff. The very purpose of contribution, however, is to avoid having the ultimate allocation of liability turn entirely upon the plaintiff's choice.

2. Moreover, there is still another base on which to rest the monetary liability of unions that promote discriminatory wage scales. When a union like TWU or ALPA encourages or endorses contractual wage levels that are found to be sexually discriminatory, the union necessarily has engaged in an actionable breach of its federal common law duty of fair representation.

---

[21] While the two statutes contain different procedures for pressing claims, the substantive terms establishing the underlying violation are identical. *See generally Zontelli Brothers v. Northern Pacific Ry.*, 263 F.2d 194, 197-99 (8th Cir. 1959) (differences in extent of liability and effect of contributory negligence between the Minnesota wrongful death statute and the Federal Employers Liability Act do not preclude a right of contribution between parties subject to liability under those acts).

The principle of contribution only requires that both defendants *could* have been held liable to the same plaintiff for the same injury; it does not require that the plaintiff actually press or perfect a claim against both.

Because of its position as sole representative of all employees in the bargaining unit, a union has a duty to represent all employees fairly.[22] This principle was first recognized in the *Steele* case twenty years before the passage of the Equal Pay Act. In that case, in which black workers sued a union alleging that it was discriminating against them, the Court declared that a union like TWU and ALPA, certified as exclusive bargaining representative under the Railway Labor Act, 45 U.S.C. §§ 152, 181, owes "the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts," without discriminating against any group of employees, 323 U.S. at 202-03, and must respond in damages for breach of that duty.

Can there be any doubt that a union's violation of the Equal Pay Act breaches its duty of fair representation? The lower federal courts have had little difficulty in recognizing that complicity in sex discrimination constitutes an equally actionable abuse of exclusive bargaining status. On many occasions, the courts have ruled that a union breaches its duty of fair representation by negotiating contracts that discriminate on the basis of sex.[23]

In the *Hotel Workers* case, *supra*, for example, the employer was initially responsible for relegating women workers to lower paying job classifications, even though

---

[22] *See International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 47 (1979); *Vaca v. Sipes*, 386 U.S. 171, 190 (1967); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-38 (1953); *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 198-199 (1944). *See generally* Schlei & Grossman, *Employment Discrimination Law* 641-55 (1976).

[23] *E.g., Farmer v. Hotel Workers Local 1064, supra*, 19 E.P.D. at 6631-32; *Chrapliwy v. Uniroyal, Inc., supra*, 458 F. Supp. at 282; *Glus v. G. C. Murphy Co.*, 329 F. Supp. 563, 567-68 (W.D. Pa. 1971).

their duties were similar to those of the men. The union was found to have breached its duty of fair representation in continuing to negotiate for larger increases for the men than for the women. 19 E.P.D. at 6631-32. Similarly, in *Uniroyal, supra*, the district court referred to the Equal Pay Act's standard for what constitutes "equal work" in deciding that the union had breached its duty of fair representation by agreeing to a contract that maintained discriminatory wage rates. 458 F. Supp. at 282. Those breaches precisely parallel the actions of TWU and ALPA here in urging and embracing the purser pay differential.

A union that violates the duty of fair representation can be held liable for damages, including lost wages, resulting from its wrongful acts. *See, e.g., International Brotherhood of Electrical Workers v. Foust, supra*, 442 U.S. at 48-49. Where a union's breach of its duty of fair representation results from its "negotiation of arbitrary and discriminatory contractual provisions," and when union and employer are sued together, then "the union may be held jointly and severally liable with the company or its liability for damages may be apportioned to the extent that it shares responsibility for the whole of such damage."[24] This Court itself has recognized that an employer and a union may be concurrently liable for portions of the same injury, even though the remedy against the employer is founded directly on a statute and the union's liability flows from its breach of its duty of fair representation. *Czosek v. O'Mara*, 397 U.S. 25, 28-29 (1970).

Where, as here, there is concurrent liability—under the Equal Pay Act for the employer, and at least under the duty of fair representation for the unions—the basis for a

---

[24] *Farmer v. Hotel Workers, supra*, 19 E.P.D. at 6633; *see Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 798 (2d Cir. 1974); *Petersen v. Rath Packing Co.*, 461 F.2d 312, 316 (8th Cir. 1972); *Richardson v. Communications Workers*, 443 F.2d 974, 982 (8th Cir. 1971), *cert. denied*, 414 U.S. 818 (1973).

claim for contribution exists if the employer alone has been sued. Contribution has been permitted on this basis when the underlying conduct of the employer violated Title VII.[25] Contribution should also be recognized when the backpay award against the employer is based on the Equal Pay Act. *See Wirtz v. Hayes Industries, Inc.*, 1 E.P.D. ¶9874 (N.D. Ohio 1968).

3. Allowing contribution will advance the policy of eliminating employment discrimination.

The predicates for contribution exist; the Court should uphold the right. The Court has recognized that Congress relied upon the prospect of backpay liability as the primary incentive to induce all the participants in the employment relationship, including unions, to strive to eliminate discrimination. As stated in *Albemarle Paper Co. v. Moody, supra*, it is only the "reasonably certain prospect of a backpay award" that serves as an adequate "spur or catalyst" to cause "employers *and unions*" to undertake the effort to "self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges" of employment discrimination. 422 U.S. at 417-18 (emphasis added).

Contribution assures that backpay liability will serve as the "spur or catalyst" that Congress intended. Because contribution apportions liability among all parties responsible for the discriminatory practice, recognition of contribution will insure that all parties involved face the "reasonably certain prospect" of backpay liability. Unless unions are exposed to claims for contribution, the practical wisdom of the congressional scheme as recognized by the Court will be largely pointless.

---

[25] *Farmer v. Hotel Workers, supra*, 19 E.P.D. at 6631-32; *Communications Workers v. Illinois Bell Telephone Co.*, 12 E.P.D. ¶ 11,275, at 5907 (N.D. Ill. 1973); *see also Stevenson v. International Paper Co., supra*, 432 F. Supp. at 408.

The realistic prospect of backpay liability will force each participant in the collective bargaining process to exercise independent judgment in identifying and challenging discriminatory practices. As Judge Higginbotham concluded, writing for the Third Circuit just a few months ago in upholding an employer's claim for contribution against a union under Title VII, a "right of contribution would achieve this goal." *Glus v. G. C. Murphy Co., supra*, 23 F.E.P. Cas. at 91. Quoting with approval the opinion of the district court in the present case (Pet. App. 16b-17b), Judge Higginbotham explained:

> "Under a rule of contribution, '[b]oth union and employer will know that they must be vigilant to eschew unlawful discrimination and that the employee's predilection as to whom to sue will not insure either immunity from the mandates of the law.' *Northwest Airlines, Inc. v. Transport Workers Union* . . . ." 23 F.E.P. Cas. at 91.

A refusal to allow contribution, by contrast, would effectively destroy the "reasonably certain prospect" of backpay liability that Congress intended to create for both unions and employers. A no-contribution rule would permit an employee, by choosing to bring an action only against an employer, to "fasten liability on one party to a labor contract which was a substantial cause of the discriminatory employment practices and grant total immunity from such liability to the other party." *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1381 (5th Cir. 1974). That result hardly advances the congressional plan.

Unions more than employers would be the beneficiaries of such a rule. Union members will surely be reluctant to take on their own unions if they can avoid a direct confrontation. Under a no-contribution rule, a union that has participated in discrimination against a group of employees could effectively insulate itself from liability by persuading the injured employees to assert

their claims against the employer alone. The union could, for example, adopt empty rhetoric about abolishing discrimination in an effort to persuade the aggrieved employee that the employer alone was responsible for the discriminatory practices. Peer pressure, appeals to union loyalty, even coercive tactics may be the basis for inducing an employee not to sue the union. The consequences of a no-contribution rule, therefore, would be substantial insulation of unions from the liability that Congress has seen fit to impose upon them.

As the legislative history underlying both statutes shows, Congress appreciated the blunt fact that unions as well as employers cause employment discrimination and that they often have an independent motive to do so. As the Second Circuit noted in *EEOC v. Steamfitters Local 638*, 542 F.2d 579, 585 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977), "in many instances, it may well be that union, rather than employer, discrimination is the prime factor resulting in the evil proscribed under Title VII . . . ." For example, in the routine situation in which an employer is prepared to agree to a wage package of a certain total amount, it is the union that has the primary interest in how the wages are allocated among various jobs. The employer may gain nothing from a discriminatory wage scale, but a faction controlling the union's bargaining—white workers, for example, or men—may profit handsomely from the division they construct. Thus, in *Farmer v. Hotel Workers*, *supra*, 19 E.P.D. ¶9075, a union bargained for the exclusion of women from certain jobs, allowing it to gain advantages for the eligible men.[26]

---

[26] *See also EEOC v. Air Line Pilots Ass'n*, *supra*, 489 F. Supp. 1003, which held that a contract provision proposed by respondent ALPA, and as to which Northwest as the employer was "neutral," violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a)(1). Northwest was held to have

(footnote continued on following page)

Although the locals of TWU and ALPA at Northwest were composed primarily of women, women generally constitute a minority within major unions and rarely have a strong role in union leadership.[27] Similarly, the role of blacks in American unions leaves them largely dependent on the vigor with which union leaders wish to press for equal employment opportunity. History shows that the interests of minority members "frequently diverge from those of the union leadership, especially on discrimination issues." *Union Liability, supra*, 93 Harv. L. Rev. at 707 n.25. Thus, if a claim for contribution were utterly barred, the natural reluctance of employees to sue their unions and the ability of unions to manipulate the victims of discrimination to sue their employers alone would license unions to discriminate with virtual impunity.

Furthermore, if unions were shielded from contribution claims by employers with whom they act in concert, unions would lack any effective incentive to identify and to work toward correcting discriminatory practices perpetuated through collective bargaining. As the Fifth

---

(footnote continued from preceding page)

violated the ADEA because it "acquiesced in the pressures brought to bear by ALPA during negotiation" of the contract. Damages were equitably apportioned in accordance with the principle of proportionate fault, with greater damages assessed against ALPA.

[27] Women made up only 22% of union membership in 1976, the most recent year for which complete data are available. *See* U.S. Department of Labor, Bureau of Labor Statistics, *Directory of National Unions and Employee Associations 1977* at 64 (1979) (Bulletin No. 2044) (hereafter, "*BLS Union Directory*"). At that time, the "leadership of most unions did not reflect the sexual composition of the organizations' membership." *Id.* at 66-67. This is unlikely to be significantly different today. In 1976, although 22% of union rank-and-file membership was female, women comprised only 8% of the unions' governing boards. *Id.*

Circuit aptly stated when it recognized a right of contribution for Title VII liability in *Myers v. Gilman Paper Corp.*, *infra* note 28, 544 F.2d at 851-52:

> "Being jointly responsible for the creation and maintenance of this [discriminatory] system, [the unions] had an affirmative obligation to seek Title VII compliance. Had one of the unions, for example, forcefully brought Title VII's requirements to the company's and the other unions' attention, that might have provided the necessary stimulus for some or all of the other joint wrongdoers to end the violations."

These observations have pointed relevance to this case, where the two unions repeatedly pressed to preserve and enlarge the purser pay differential later held to be discriminatory. It is unthinkable that the pay differential would have persisted as long as it did if the unions had protested the differential as discriminatory, instead of coming to the bargaining table year after year urging that it be not only continued, but enlarged. One group of union members profited from this wage differential. If Northwest discriminated in paying higher wages to pursers, TWU and ALPA helped to cause the discrimination by regularly proposing the differential in bargaining and agreeing to it in contracts. Neither Title VII nor the Equal Pay Act was intended to lay all of the consequences of these years of collective bargaining solely at Northwest's door.

Not suprisingly, virtually every lower federal court to address the issue has concluded that an employer may seek contribution for a share of common liability under the

employment discrimination laws.[28] As these courts have recognized, a union's practical immunity from backpay liability would result in more persistent discrimination than if both unions and employers face realistic prospects of liability for discriminatory practices established in their collective bargaining contracts. This Court can preserve a meaningful incentive for unions to police employment practices and to insist on non-discriminatory collective bargaining agreements. To do this, the Court need only endorse the consensus reached by the lower courts and affirm an employer's right to pursue contribution from a union that caused the employer to discriminate or joined with the employer in the discriminatory practice.

---

[28] *E.g., Glus v. G. C. Murphy Co., supra*, 23 F.E.P. Cas. 86, *aff'g district court after remand from* 562 F.2d 880 (3d Cir. 1977); *Denicola v. G. C. Murphy Co., supra*, 562 F.2d at 892 (upholding award of contribution under Title VII); *Myers v. Gilman Paper Corp.*, 544 F.2d 837 (5th Cir.), *modified on other grounds on rehearing*, 556 F.2d 758 (5th Cir.), *cert. dismissed*, 434 U.S. 801 (1977); *Stevenson v. International Paper Co., supra*, 432 F. Supp. 390; *International Union of Electrical, Radio & Machine Workers v. Westinghouse Electric Corp.*, 73 F.R.D. 57 (W.D.N.Y. 1976); *Grogg v. General Motors Corp.*, 72 F.R.D. 523 (S.D.N.Y. 1976); *Lynch v. Sperry Rand Corp.*, 62 F.R.D. 78 (S.D.N.Y. 1973); *Gilbert v. General Electric Co.*, 59 F.R.D. 267 (E.D. Va. 1973); *Osborne v. McCall Printing Co.*, 4 F.E.P. Cas. 276 (S.D. Ohio 1972); *Blanton v. Southern Bell Telephone & Telegraph Co.*, 49 F.R.D. 162 (N.D. Ga. 1970); *Torockio v. Chamberlain Manufacturing Corp.*, 51 F.R.D. 517 (W.D. Pa. 1970); *Communication Workers v. Illinois Bell Telephone Co., supra*, 12 E.P.D. ¶11,275; *Winfield v. St. Joe Paper Co.*, 15 F.E.P. Cas. 1497 (N.D. Fla. 1977) (contribution by union against employer); *see also Parson v. Kaiser Aluminum & Chemical Corp., supra*, 575 F.2d at 1389; *Patterson v. American Tobacco Co., supra*, 535 F.2d at 257; *Carey v. Greyhound Bus Co., Inc.*, 500 F.2d 1372 (5th Cir. 1974).

4. Allowing contribution will promote fairness and even-handed enforcement of the employment discrimination laws.

Allowing contribution, moreover, is a matter of fundamental fairness. Congress provided in Title VII and in the Equal Pay Act for a balanced, even-handed imposition of liability on both employers and unions. Equitable enforcement of that policy should, to the extent feasible, allocate the burdens of backpay liability among all those participants whom Congress has made responsible for the injury. When both employer and union are responsible, the decision of a potential plaintiff to sue the employer alone may be based upon whim, spite, cooption by the union, or ignorance of the union's involvement. There is nothing in either statute to suggest that Congress was conferring on the injured employees the power to determine the *ultimate* allocation of liability. A rule that would create that power would offend the principles of even-handedness embodied in these statutes.

The power to impose backpay liability under Title VII is one of the "full equitable powers" to achieve "complete justice" conferred by the statute. *Albemarle Paper Co. v. Moody, supra*, 422 U.S. at 418. Since Title VII remedies are equitable, federal courts are not only permitted to apply equitable principles in granting relief, but are required to do so in exercising what the Court has aptly termed "equitable sensitivity." *Los Angeles Department of Water & Power v. Manhart, supra*, 435 U.S. at 718-20 & n.36; *see Albemarle Paper Co. v. Moody, supra*, 422 U.S. at 416-17. Contribution is simply one part of the "full equitable powers" conferred on the courts by Title VII.[29]

---

[29] *See Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944) ("equity [is] the instrument for the nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims").

The lower courts have already given effect to the objective of "complete justice" by apportioning backpay awards in cases where both employers and unions are before the court. For example, in *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641, 655-56 (5th Cir. 1974), an employee sued his employer and two unions alleging discrimination as a result of a job referral system established by the collective bargaining agreement. While both employer and unions were held liable, the "final responsibility for the monetary recovery" was placed upon the union because "the undisputed facts of this case identify the unions . . . as those principally responsible for plaintiff's loss . . . ." *Id.* at 656. The sound principle applied in *Guerra* is that "apportionment of the responsibility for equitable relief . . . falls within the sound discretion of the district court." *Id.* at 655.

The courts have repeatedly applied this principle in other cases.[30] It fully applies here as well. Equitable apportionment among defendants already before the

---

[30] *See, e.g., Johnson v. Goodyear Tire & Rubber Co., supra*, 491 F.2d at 1381-82; *Myers v. Gilman Paper Co.*, 392 F. Supp. 413, 423-24 (S.D. G 1975), *aff'd*, 544 F.2d 837 (5th Cir.), *modified on other grounds on rehearing*, 556 F.2d 758 (5th Cir.), *cert. dismissed*, 424 U.S. 801 (1977) (50% liability for union, 50% liability for employer); *Bush v. Lone Star Steel Corp.*, 373 F. Supp. 526, 536-37 (E.D. Tex. 1974) (one-third liability for employer, two-thirds for unions). *See also EEOC v. Air Line Pilots Ass'n., supra*, 489 F. Supp. at 1009-10 (apportionment of monetary liability under Age Discrimination Act between ALPA and Northwest).

A comparative fault rule has been recognized by this Court as more just than a rule of equally divided, *pro rata* liability. *See United States v. Reliable Transfer Co.*, 421 U.S. 397, 406-08 (1975). Of course, if it is "impossible fairly to allocate degrees of fault, the division of damages equally between wrongdoing parties is an equitable solution." *Id.* at 407.

court is simply a "shortcut" so that "a separate contribution action is unnecessary . . . ." *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 271-72 n.30 (1979). If contribution were not recognized at all, however, the policies underlying equitable apportionment would be frustrated whenever an employee elected to target the employer alone with his claim. That result, however, would nullify this Court's sound judgment in *Cooper Stevedoring* that a " 'more equal distribution' of justice can best be achieved by ameliorating the . . . rule . . . which permits a plaintiff to force one of two wrongdoers to bear the entire loss." 417 U.S. at 111 (quoting *The Max Morris*, 137 U.S. 1, 14 (1890)).

The district court in this case, therefore, was correct in ruling that Northwest's claim for contribution for a portion of its Title VII liability states a valid claim on which relief may be granted. Both the district court and the court of appeals erred, however, in refusing to sanction a contribution claim for Equal Pay Act awards as well.

5. Recognizing contribution will not unduly complicate employment discrimination suits or lead to unjustified raids on union treasuries.

In unsuccessfully opposing contribution in the lower federal courts, unions have often come forward with an imaginative parade of "horribles" that would allegedly occur under the contribution principle. We anticipate and respond now to the two principal arguments that have been raised, neither of which can claim any evidentiary support despite years of experience in the lower courts with contribution claims.

1. One argument is that contribution will introduce unwarranted confusion into employment discrimination litigation. The progress of the case cannot be impeded, however, if, as in this case, the employer defers assertion

of any claim for contribution until there is a determination that the employer himself bears some liability. The employer's later demand for contribution from the union cannot complicate the employees' assertion of their separate complaint. Indeed, as Judge Higginbotham recently explained in *Glus v. G. C. Murphy Co.*, *supra*, 23 F.E.P. Cas. at 92, a potential claim for contribution may facilitate early resolution of the employees' complaint by assuring the employer that he will not have to bear the full load of any liability. *See also Myers v. Gilman Paper Corp.*, *supra*, 544 F.2d at 845.

Even when contribution is demanded through a cross-claim or third-party claim in the employees' original suit, the possibility of significantly complicating the litigation is slim. There is virtually no additional litigation if the employees have chosen to name the union as a co-defendant. If the employer must implead the union, only one or two additional defendants will be present. In this respect, employment discrimination cases are far more streamlined than, for example, antitrust cases, where a defendant may seek to assert cross-claims or third-party claims for contribution against a large number of other firms in an industry.

In an employment discrimination case, the allocation of fair shares of the backpay liability between employer and union is a relatively simple task for the court once the court resolves the main issues of discrimination and relief. The federal courts have ample flexibility to manage the conduct of this type of litigation efficiently. Minor increments in the number of issues or parties scarcely justify rejection of all contribution claims at the courthouse door.

2. In opposing certiorari in this case, ALPA argued that contribution could impose financial hardships on unions (ALPA Brief in Opp. 17 fn.). That speculation furnishes no basis for wholesale rejection of contribution.

The argument overlooks the inescapable fact that contribution threatens no liability beyond what Congress has already decided is proper in compensating employees for union-caused discrimination.

In making this decision to hold unions equally accountable for redressing the effects of their discrimination, Congress acted with full knowledge that the major labor unions—like TWU and ALPA—are often more secure financially than the thousands of employers with whom they bargain. The spectre of large employers driving helpless unions to the financial wall is an illusion. Labor Department statistics show that most union members belong to huge national unions or their affiliates. Sixteen unions represented 60% of total union membership in 1976. *BLS Union Directory, supra*, at 63. A very "small number of unions [make] a large proportion of all collective bargaining agreements." *Id.* at 78. For example, two-thirds of all 193,000 labor contracts entered into in the United States in 1976 covered the members of only ten unions. Moreover, a total of only 170 unions negotiated contracts with 242,000 employers in that year. *Id.*

Since most labor contracts are negotiated between large, powerful unions and relatively small employers, the likely scenario is a contribution claim by a local employer against a large union with abundant resources. The danger of large companies overpowering impotent unions by asserting contribution claims is, at best, remote. Surely neither TWU nor ALPA should be heard to voice an argument about acute financial embarrassment.[31] There is,

---

[31] According to the Labor Organization Annual Report Form LM-2, which unions are required to file annually with the Department of Labor under § 201(b) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 431(b), in fiscal year 1979 TWU had total receipts of $8.13 million. ALPA for that year reported total receipts of $61.74 million.

(footnote continued on following page)

therefore, no compelling reason for this Court to create an absolute immunity for unions in defiance of deliberate congressional policy.

Furthermore, the apportionment of liability through contribution is an equitable remedy. Courts of equity will apportion liability commensurate with the conduct of each party responsible for the injury and with sensitivity to any unusual hardship that liability may impose. *See Los Angeles Department of Water & Power v. Manhart*, *supra*, 435 U.S. at 718-22; *Restatement (Second), Torts*, § 886A, comment c. *See also* Prosser, *Law of Torts*, § 50, at 310 (4th ed. 1971). Unions, therefore, cannot honestly offer the spectre of large contribution awards bleeding dry the treasuries of impoverished but blameless labor organizations. Courts can easily deal with serious hardships in any case in which a union's "fair share" of backpay liability exceeds its ability to pay. First, though, this Court should affirm the existence of the contribution right itself.

II. NO SPECIAL RULES GOVERNING TIMELINESS AND PROCEDURE SHOULD APPLY TO CONTRIBUTION CLAIMS IN EMPLOYMENT DISCRIMINATION CASES.

A. Contribution Claims May Always Be Asserted In A Separate Action Filed After Judgment Is Entered In The Underlying Case.

For many years it was hornbook law that a contribution claim did not accrue until the party seeking contribution actually paid a disproportionate share of a judgment.

(footnote continued from preceding page)

As of 1976, reporting labor unions disclosed total assets of $3.93 billion (exclusive of assets held by their pension funds). *See* U.S. Department of Labor, Labor Management Services Administration, *Union Financial Statistics 1976*, at 6-7. The unions reported total annual receipts of $6.16 billion. *Id.* at 12. ALPA ranked seventh in the country in amount of annual receipts among all national unions. *Id.* at 33.

A claim brought before payment was therefore considered premature. Prosser, *Law of Torts*, § 50, at 309 n.80 (4th ed. 1971). While the rule requiring actual payment before assertion of a contribution claim has persisted in some courts, others have modified it to the extent of allowing a contingent contribution claim to be asserted by a cross-claim or third-party claim in the main lawsuit. 3 Moore, *Federal Practice* ¶¶14.03[3], 14.08, 14.11 (2d ed. 1979).

The timing of Northwest's suit was in line with an interim course. Northwest first attempted to assert its claim in the *Laffey* case, eight days after the district court entered a judgment imposing liability, but before appellate review or payment of any monetary award. That attempt failed for procedural reasons. When Northwest filed a separate lawsuit a few months later, ALPA and TWU responded with a defense of "laches" (JA 29 ¶26, 34 ¶15). The district court did not pass on this alleged defense, but the court of appeals remanded Northwest's contribution claim for a determination whether the claim is barred by laches (Pet. App. 13d). As a matter of law, however, an element necessary to establish "laches" —unreasonable delay—cannot exist in this case.[32]

The long-standing and uniform rule is that a contribution claim may be asserted in a separate action brought within a reasonable time after payment of the judgment by the party seeking contribution.[33] Northwest was entitled to rely on this rule in making its decision to wait at

---

[32] The other essential element, actual prejudice, has not been probed here. *See, e.g., Albemarle Paper Co. v. Moody, supra*, 422 U.S. at 424; *Costello v. United States*, 365 U.S. 265, 282 (1961); *Bernard v. Gulf Oil Co.*, 596 F.2d 1249, 1256 (5th Cir. 1979).

[33] *See, e.g., Keleket X-Ray Corp. v. United States*, 275 F.2d 167, 169 (D.C. Cir. 1960); *Smith v. Whitmore*, 270 F.2d 741 (3d Cir. 1959); *DeVore Brokerage Co. v. Goodyear Tire & Rubber Co.*, 308 F. Supp. 279 (M.D. Tenn. 1969); *Huggins v. Graves*, 210 F. Supp. 98, 104 (E.D. Tenn. 1962), *aff'd*, 337 F.2d 486 (6th Cir. 1964);

(footnote continued on following page)

least until the district court decided whether Northwest had any liability at all before bringing its contribution claim. This type of patience is eminently reasonable, since it avoids skirmishing over cross-claims that could turn out to be utterly unnecessary if the employees fail to prove their discrimination claim. In addition, Northwest could hardly have attempted to cross-claim against ALPA in the *Laffey* suit, since ALPA did not displace TWU as the cabin attendants' bargaining representative until 1971 and did not enter into a contract with Northwest until December 1972—by which time the *Laffey* trial was already under way.

Indeed, in the district court ALPA moved to dismiss or stay Northwest's contribution claim as "premature," arguing that a right to contribution does not even arise until a judgment actually has been paid. Thus, ALPA contended, Northwest's claim was not yet "ripe" (JA 1, 28 ¶ 21; Pet. App. 36 n.6). There are some cases that suggest that conclusion,[34] but modern doctrine, including the Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.*, invoked by Northwest (JA 16, 20-21, ¶¶4, 11, 13, 15, 16), no longer requires this postponement. The district court,

---

(footnote continued from preceding page)

Falciani v. Philadelphia Transportation Co., 189 F. Supp. 203 (E.D. Pa. 1960); Prosser, *Law of Torts* § 50, at 309 (4th ed. 1971).

The Uniform Contribution Among Tortfeasors Act, 12 U.L.A. 57 (1975), promulgated in 1955 and adopted in many states, proposes that a contribution claim must be brought within one year of the date on which the judgment of liability becomes final after appeal or after the time to appeal has lapsed. Section 3(c), 12 U.L.A. at 88.

[34] *E.g.*, *Minneapolis S.P. & S.S.M. R. Co. v. City of Fond Du Lac*, 297 F.2d 583, 585 (7th Cir. 1961); *Harris v. Standard Accident & Insurance Co.*, 297 F.2d 627, 635 (2d Cir. 1961), *cert. denied*, 369 U.S. 843 (1962); *Val Marine Corp. v. Costas*, 256 F.2d 911, 916 (2d Cir. 1958); *Dennler v. Dodge Transfer Co.*, 201 F. Supp. 431 (D. Conn. 1962); *Bair v. Bryant*, 96 A.2d 508, 510 (D.C. Ct. App. 1953); *see generally* 18 Am. Jur. 2d *Contribution* § 50, at 72 (1965).

therefore, properly ruled that Northwest's complaint raised a real, timely controversy and that Northwest would "suffer substantial prejudice" from further deferral of the contribution action, as ALPA urged. *Northwest Airlines, Inc. v. Transport Workers Union*, 10 E.P.D. ¶10,484 (D.D.C. 1975).

Against this backdrop, it would be quite ironic to label as "unreasonable delay" Northwest's reliance on long-standing precedent in deferring its contribution claim until eight days after entry of the adverse judgment. Absolutely nothing in Title VII or the Equal Pay Act suggests that the traditional rule governing the timeliness of contribution claims should not apply here. Even if in some case it might be unreasonable to wait until actual payment of the judgment after years of appellate proceedings, this Court should conclude that, as a matter of law, there is no unreasonable delay when an employer asserts a contribution claim promptly after the trial court's determination of the employer's liability.

B. Special Procedural Rules Governing Contribution For Employment Discrimination Liability Are Unwarranted.

In the court of appeals, the EEOC agreed that contribution should be permitted under Title VII (taking no position on the Equal Pay Act issue because it then lacked responsibility for enforcing that Act). The EEOC also acknowledged that contribution claims generally may be asserted in separate actions brought after the underlying liability is adjudicated and satisfied.[35]

The EEOC, nevertheless, also took the position that the courts should create a novel, rigid procedural rule that in Title VII cases the employer must assert a contribution claim at the outset of the original Title VII litigation and must first ask the EEOC to attempt conciliation of its

---

[35] Brief of the EEOC as *amicus curiae*, filed in the court of appeals June 16, 1978, at 39-57.

claim against the union pursuant to Sections 705(g)(4) and 706(f)(1) of the Act, 42 U.S.C. §§ 2000e-4(g)(4) and 5(f)(1). EEOC Br. at 59-66. The EEOC had never suggested these conditions in any other case, and none of the many courts that have entertained employers' contribution claims have imposed any such requirements. The suggested conditions lack any legitimate foundation.

1. The federal joinder and cross-claim rules are purely permissive. *See* Fed. R. Civ. P. 13(g), (h), 14(a); 3 Moore, *Federal Practice*, ¶14.06 (2d ed. 1979). The EEOC's position, however, would inject for one category of contribution claims an exception that would be at odds with the flexible alternatives carefully preserved by the Federal Rules. Nothing in Title VII or the Equal Pay Act manifests any congressional intent to create a special iron-clad rule of compulsory cross-claims and third-party claims for contribution in this field.

2. Equally misguided is the EEOC's attempt to transform the permissive conciliation process under Sections 705(g)(4) and 706(f)(1) into a mandatory prerequisite for Title VII contribution. These provisions by their terms are permissive. Employees may bypass the conciliation process and request a right-to-sue letter before the EEOC undertakes any conciliation efforts. That is precisely what the *Laffey* plaintiffs did, filing their complaint in court before the EEOC undertook any conciliation and, indeed, before Northwest received notice that an EEOC charge had been filed. The courts have uniformly held that resort to conciliation is not a precondition to suits by the employees who file the charges.[36]

---

[36] Neither actual notice of the filing of a charge nor conciliation by the EEOC is a prerequisite to a Title VII suit against the charged party. *See Russell v. American Tobacco Co.*, 528 F.2d 357, 365 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976); *Miller v. International Paper Co.*, 408 F.2d 283, 290-91 (5th Cir. 1969); *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357, 361 (7th Cir. 1968).

There is no reason why an employer's contribution claim should be subject to tighter strictures than the employee's underlying charge.

Moreover, an employer's request for conciliation is not necessary to trigger EEOC action or union participation in conciliation. Where the charge filed with the EEOC implicates a collective bargaining agreement, the EEOC's own procedure is to involve the union in any conciliation efforts it undertakes. EEOC *Compliance Manual* (CCH) § 62.7(c) (1979). In this case, the EEOC did not undertake conciliation because the employees were unwilling to wait for it. Had conciliation been undertaken, the *Laffey* plaintiffs' charge would have alerted the EEOC that the terms of a collective bargaining agreement were at issue. Thus, in this case, the EEOC would have had an opportunity to conciliate with all parties, including the incumbent unions. It was the *Laffey* plaintiffs' eagerness to file suit, rather than Northwest's failure to request conciliation, that precluded any conciliation efforts by the EEOC. Within a statutory framework where the aggrieved employees may circumvent EEOC conciliation machinery, no purpose would be served by a rule that conditions a contribution action on an employer's request for conciliation.

3. In any event, it would be quite unfair and improper to impose retroactively any procedural rules of the kind suggested by the EEOC to bar Northwest's contribution claim. Neither in 1970 nor in 1975 did Northwest have any reason to suspect that a Title VII contribution claim would be barred if it simply awaited the trial judge's decison on the merits in *Laffey*. Since the EEOC has never complied with statutory rule-making requirements for the "statement of policy" or "interpretation" suggested in the court below, the Administrative Procedure Act, 5 U.S.C. § 552(a)(2), expressly protects Northwest from being prejudiced by the EEOC's suggestion.

C. The Failure To File An EEOC Charge Against A Union Does Not Bar An Employer's Claim For Contribution.

ALPA and TWU have argued that they are immunized from liability for contribution for Title VII backpay because the *Laffey* plaintiffs did not file charges against them with the EEOC. This argument has been soundly rejected by the lower federal courts.

Title VII generally requires that a "person aggrieved" by violation of Title VII must file a timely charge with the EEOC before he or she may bring an action in court under Title VII. Section 705(e), 42 U.S.C. § 2000e-5(e). Thus, because the *Laffey* plaintiffs filed no EEOC charge against the unions, they may have lost their right to press a backpay claim against the unions for the unions' Title VII violations. But to allow that fact to control the employer's right to contribution would be to repudiate the whole purpose of contribution: to prevent the original plaintiff from dictating the ultimate allocation of liability.

As the EEOC acknowledged below, the charge-filing requirement is irrelevant to the employer's rights. Northwest as an employer lacked standing itself to file a Title VII charge against the unions. *Foust v. Safeway Stores, Inc.*, 556 F.2d 946, 947 (9th Cir. 1977). It is asserting a federal common law right of contribution, not a discrimination claim under Title VII itself. *See Glus v. G. C. Murphy Co., supra*, 23 F.E.P. Cas. at 88. Thus, Northwest's rights do not depend upon the filing of a Title VII charge by any person.

For this reason, the absence of a charge against the unions poses no jurisdictional obstacle to the contribution claim. A contribution claim may be brought in federal court under general federal question jurisdiction, 28 U.S.C. § 1331, and is not subject to the statutory prerequisites of Title VII. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975) (employment discrimination action may be brought under 42 U.S.C. § 1981

regardless of compliance with Title VII procedures).[37] The routine recognition of contribution rights by lower courts even where no EEOC charges had been filed against the unions demonstrates the inapplicability of the charge-filing procedure here.[38]

The employer's contribution suit against the union requires only that the unions once have had potential liability to the original plaintiffs. Any procedural defenses to the enforcement of the unions' direct liability to the employees are irrelevant to a contribution claim, once the employees have obtained a judgment against a concurrent tortfeasor. The courts have consistently held, in the most analogous situation, that the running of a statute of limitations against the original plaintiff's cause of action does not bar the claim for contribution.[39] The contribution claim has an independent life of its own.

Accordingly, Northwest has established all of the predicates for its contribution claims, and there are no special procedural hurdles to the enforcement of these claims at a trial on the merits. The Court should now allow Northwest to prove its case.

---

[37] The district court below also held that "the uncontested allegations in the complaint reveal that the Court has diversity jurisdiction, pursuant to 28 U.S.C. § 1332, and [Northwest] has alleged such jurisdiction in its complaint." (Pet. App. 8b). The scope of Northwest's contribution rights under applicable state law is not before the Court.

[38] *E.g., Glus v. G. C. Murphy Co., supra*, 23 F.E.P. Cas. at 88 & n.1; *Grogg v. General Motors Corp., supra*, 72 F.R.D. at 528; *McDonald v. General Mills, Inc.*, 387 F. Supp. 24, 37-38 (E.D. Cal. 1974); *Osborne v. McCall Printing Co., supra*, 4 F.E.P. Cas. at 279.

[39] *See, e.g., Keleket X-Ray Corp. v. United States, supra*, 275 F.2d 167; *Cooper v. Philadelphia Dairy Products Co.*, 34 N.J. Super. 301, 112 A.2d 308 (1955); *Godfrey v. Tidewater Power Co.*, 223 N.C. 647, 27 S.E.2d 736 (1943); *Ainsworth v. Berg*, 253 Wis. 438, 34 N.W.2d 790 (1948), *on rehearing*, 253 Wis. 445a, 35 N.W.2d 911 (1949). *See also Nolechek v. Gesuale*, 46 N.Y.2d 332, 413 N.Y.S.2d 340, 385 N.E.2d 1268 (1978); *Smith v. Southern Farm Bureau Cas. Ins. Co.*, 247 La. 695, 174 So.2d 122 (1965).

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded with directions (1) to reverse the district court's judgment dismissing the Equal Pay Act contribution claim and (2) to affirm the district court's order denying the motions to dismiss the Title VII contribution claim.

Respectfully submitted.

PHILIP A. LACOVARA
Attorney for Petitioner
Northwest Airlines, Inc.

Of counsel:

Jay Kelly Wright
William R. Stein
Marcy J. K. Tiffany

August 1980.

APPENDIX A

STATES THAT RECOGNIZE CONTRIBUTION

Alaska:	*Arctic Structures, Inc.* v. *Wedmore*, 605 P.2d 426 (Alaska 1979)
Arkansas:	*Commercial Casualty Insurance Co.* v. *Leonard*, 210 Ark. 575, 196 S.W.2d 919 (1946)
California:	*Augustus* v. *Bean*, 56 Cal. 2d 270, 14 Cal. Rptr. 641, 363 P.2d 873 (1961)
Colorado:	*Coniaris* v. *Vail Associates, Inc.*, 586 P.2d 224 (Colo. 1978)
Delaware:	*Halifax Chick Express, Inc.* v. *Young*, 50 Del. 596, 137 A.2d 743 (1958)
District of Columbia:	*George's Radio, Inc.* v. *Capital Transit Co.*, 126 F.2d 219 (D.C. Cir. 1942)
Florida:	*Lincenberg* v. *Issen*, 318 So.2d 386 (Fla. 1975)
Georgia:	*Traveler's Indemnity Co.* v. *Liberty Loan Corp.*, 140 Ga. App. 458, 232 S.E.2d 399 (1976)
Hawaii:	*Tamashiro* v. *DeGama*, 51 Hawaii 74, 450 P.2d 998 (1969)
Idaho:	*Brockman Mobile Home Sales* v. *Lee*, 98 Idaho 530, 567 P.2d 1281 (1977)
Illinois:	*Skinner* v. *Reed-Prentice Div. of Package Machinery Co.*, 70 Ill. 2d 1, 374 N.E.2d 437 (1977), *cert. denied*, 436 U.S. 946 (1978).
Iowa:	*Best* v. *Yerkes*, 247 Iowa 800, 77 N.W.2d 23 (1956)
Kansas:	*City of Fort Scott* v. *Kansas City, F.S. & M. R. Co.*, 66 Kan. 610, 72 P. 238 (1903)
Kentucky:	*Consolidated Coach Corp.* v. *Burge*, 245 Ky. 631, 54 S.W.2d 16 (1932)
Louisiana:	*Smith* v. *Southern Farm Bureau Casualty Insurance Co.*, 247 La. 695, 174 So.2d 122 (1965)
Maine:	*Hobbs* v. *Hurley*, 117 Me. 449, 104 A. 815 (1918)
Maryland:	*O'Keefe* v. *Baltimore Transit Co.*, 201 Md. 345, 94 A.2d 26 (1953)
Massachusetts:	*Hayon* v. *Coca Cola Bottling Co. of New England*, 1978 Mass. Adv. Sh. 1888, 378 N.E.2d 442 (1978)
Michigan:	*Duncan* v. *Beres*, 15 Mich. App. 318, 166 N.W.2d 678 (1968)
Minnesota:	*Duluth M. & N. Ry. Co.* v. *McCarthy*, 183 Minn. 414, 236 N.W. 766 (1931)

Mississippi:	*Klass* v. *Continental Southern Lines, Inc.*, 225 Miss. 94, 82 So.2d 705 (1955)
Missouri:	*Miller* v. *United Railways Co. of St. Louis*, 155 Mo. App. 528, 134 S.W. 1045 (1911)
Nebraska:	*Royal Indemnity Co.* v. *Aetna Casualty & Surety Co.*, 193 Neb. 752, 229 N.W.2d 183 (1975)
Nevada:	Nev. Rev. Stat. §§ 17.225-17.305 (1973)
New Hampshire:	*Scahill* v. *Miniter*, 101 N.H. 56, 132 A.2d 140 (1957)
New Jersey:	*Scattelberger* v. *Telep*, 14 N.J. 353, 102 A.2d 577 (1954)
New Mexico:	*Barley* v. *Jeffries-Eaves, Inc.*, 76 N.M. 278, 414 P.2d 503 (1966)
New York:	*Nolechek* v. *Gesuale*, 46 N.Y.2d 332, 413 N.Y.S.2d 340, 385 N.E.2d 1268 (1978)
North Carolina:	*Taylor* v. *Kinston Free Press Co.*, 237 N.C. 551, 75 S.E.2d 528 (1953)
North Dakota:	*Bartels* v. *City of Williston*, 276 N.W.2d 113 (N.D. 1979)
Ohio:	*Walsh* v. *Jellen*, 51 Ohio Misc. 97, 5 Ohio Op. 3d 176 (C.P. 1977)
Oregon:	*Miller* v. *City of Portland*, 288 Or. 271, 604 P.2d 1261 (1980)
Pennsylvania:	*Anstine* v. *Pennsylvania R. Co.*, 352 Pa. 547, 43 A.2d 109 (1945)
Rhode Island:	*Hacket* v. *Hyson*, 72 R.I. 132, 48 A.2d 353 (1946)
South Dakota:	*Degen* v. *Bayman*, 90 S.D. 400, 241 N.W.2d 703 (1976)
Tennessee:	*Velsicol Chemical Corp.* v. *Rowe*, 543 S.W.2d 337 (Tenn. 1976)
Texas:	*Austin Road Co.* v. *Pope*, 147 Tex. 430, 216 S.W.2d 563 (1949)
Utah:	*Rees* v. *Albertson's, Inc.*, 587 P.2d 130 (Utah 1978)
Virginia:	*McKay* v. *Citizens Rapid Transit Co.*, 190 Va. 851, 59 S.E.2d 121 (1950)
West Virginia:	*Haynes* v. *City of Nitro*, 240 S.E.2d 544 (W. Va. 1978) (citing *Buskirk* v. *Sanders*, 70 W.Va. 363, 73 S.E. 937 (1912))
Wisconsin:	*Ellis* v. *Chicago & N.W.Ry. Co.*, 167 Wis. 392, 167 N.W. 1043 (1918)
Wyoming:	*Chrysler Corp.* v. *Todorovich*, 580 P.2d 1123 (Wyo. 1978)

Supreme Court, U. S.
FILED
OCT 24 1980
MICHAEL RODAK, JR., CLERK

No. 79-1056

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

AND

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

STEPHEN B. MOLDOF
Cohen, Weiss and Simon
605 Third Avenue
New York, N. Y. 10158
(212) 682-6077
Attorney for Respondent Air Line Pilots Association, International

Of Counsel:

KEITH E. SECULAR
JAY P. LEVY-WARREN

Questions Presented

1. Whether the Court below correctly concluded, consistent with all other decisions on the issue, that an employer held liable under the Equal Pay Act may not seek contribution from a union for that Equal Pay Act liability.

2. In the absence of any provision in Title VII of the Civil Rights Act of 1964 allowing for contribution, may an employer previously held liable under the Act maintain an independent action against a union for reimbursement for any portion of that Title VII liability where the union has never been named in a charge of discrimination filed with the Equal Employment Opportunity Commission, afforded any opportunity to conciliate, or named in a complaint or adjudicated liable in a Title VII action brought by an "aggrieved person"?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

A. The Underlying Title VII and EPA Litigation 2

B. Northwest's Belated Attempts to Assert Claims Against the Unions 3

C. The Decision of the District Court 4

D. The Decision of the Court of Appeals 4

1. Equal Pay Act contribution 4

2. Title VII contribution 4

SUMMARY OF ARGUMENT 5

ARGUMENT

I. A RIGHT TO CONTRIBUTION FOR LIABILITY UNDER TITLE VII OR THE EQUAL PAY ACT MAY BE JUDICIALLY ESTABLISHED ONLY IF CONGRESS INTENDED TO CREATE SUCH RIGHT 8

A. There Is No Federal Common Law From Which a Right to Contribution May Be Derived Independent of Statutory Authorization 9

B. A Statute Cannot Be Found to Authorize Contribution If Congress Did Not Intend to Create Such a Right 12

II. THERE IS NO BASIS FOR CONTRIBUTION FOR TITLE VII OR EQUAL PAY ACT LIABILITY 14

PAGE

A. The Absence of Provisions for Contribution in Title VII and the Equal Pay Act Demonstrates Congressional Intent Not to Provide for Contribution for Liabilities Under Those Statutes 15

B. The Text and Legislative History of the Equal Pay Act Bar Contribution 17

1. The statute precludes private damage claims against unions for EPA liability 17

2. The courts have uniformly concluded the EPA does not subject unions to private damage claims for EPA liability 19

3. The legislative history of the EPA demonstrates that Congress did not intend to subject unions to private damage claims for EPA liability 21

4. Contribution conflicts with important EPA policy 24

C. The Text and Legislative History of Title VII Bar Contribution 25

1. Congress intentionally limited the means by which Title VII may be enforced 25

2. Congress did not authorize discriminatory employers to establish union Title VII liability 28

3. Title VII liability cannot be established by extra-statutory means 29

D. The District Court Lacks Jurisdiction Over Northwest's Claim for Contribution for Its Title VII Liability Against Defendants That Have Not Been Charged With Discrimination Before the EEOC 32

PAGE

1. The filing of an EEOC charge is an absolute jurisdictional requirement 32

2. Title VII's jurisdictional prerequisites bar Northwest's contribution claim 33

E. Policy Considerations Do Not Support Contribution for Title VII or EPA Liability 36

1. A right of contribution will not deter violations of Title VII and the EPA 37

2. Recognition of a right of contribution would discourage enforcement of Title VII and the EPA by aggrieved employees 38

3. Contribution would discourage affirmative action by unions 40

4. Contribution would discourage settlement of Title VII and EPA cases 40

5. Title VII's guarantees of fair treatment to all respondents would be undermined by recognition of a contribution claim in this action 41

6. Contribution would conflict with Title VII's requirement that claims of Title VII violations be promptly asserted 42

F. Contribution for Title VII and EPA Liability Cannot Be Predicated on Any Other Sources of Liability 44

CONCLUSION 47

SUPPLEMENTAL APPENDIX A:

Pertinent Statutory Provisions 1a

PAGE

SUPPLEMENTAL APPENDIX B:

Excerpts From Transcript of Oral Argument Before Court of Appeals 5a

TABLE OF AUTHORITIES

Cases:

Air Line Pilots Association v. *Continental Air Lines*, 10 FEP Cases 462 (N.D. Ill. 1974) 40
Air Line Pilots Association v. *Ozark Air Lines*, 10 FEP Cases 463 (N.D. Ill. 1975) 40
Air Line Pilots Association, International v. *United Air Lines, Inc.*, 480 F. Supp. 1107 (E.D.N.Y. 1979) 40
Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) 29, 30, 31, 38, 39, 42
Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) 25, 32, 40
Alyeska Pipeline Service Co. v. *Wilderness Society*, 421 U.S. 240 (1975) 13, 37
American Fire & Casualty Co. v. *Finn*, 341 U.S. 6 (1951) 36
Avco Corp. v. *Aero Lodge No. 735, IAM*, 390 U.S. 557 (1968) 34
Avondale Shipyards, Inc. v. *Vessel Thomas E. Cuffe*, 434 F. Supp. 920 (E.D. La. 1977) 42

Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398 (1964) 11
Bank of America National Trust and Savings Association v. *Parnell*, 352 U.S. 29 (1956) 11
Baughman v. *Cooper-Jarrett, Inc.*, 391 F. Supp. 671 (W.D. Pa. 1975), *aff'd and modified on other grounds*, 530 F.2d 529 (3d Cir.), *cert. denied*, 429 U.S. 825 (1976) 16
Beverly v. *Lone Star Lead Construction Corp.*, 437 F.2d 1136 (5th Cir. 1971) 33

PAGE

Bivens v. *Six Unknown Named Agents*, 403 U.S. 388 (1971) 9, 10
Bowe v. *Judson C. Burns*, 137 F.2d 37 (3d Cir. 1943) 18-19
Brennan v. *Emerald Renovators, Inc.*, 410 F. Supp. 1057 (S.D.N.Y. 1975) 19, 20, 25, 37, 38
Brotherhood of Railroad Trainmen v. *Howard*, 343 U.S. 768 (1952) 36

Cannon v. *University of Chicago*, 441 U.S. 677 (1979) 9, 13, 14, 16
Carlson v. *Green*, 100 S.Ct. 1468 (1980) 10
Carriers Insurance Exchange v. *Truck Insurance Exchange*, 310 F.2d 653 (4th Cir. 1962) 16, 37
Chrapliwy v. *Uniroyal, Inc.*, 458 F. Supp. 252 (N.D. Ind. 1977) 45
Christiansburg Garment Co. v. *EEOC*, 434 U.S. 412 (1978) 38
Clearfield Trust Co. v. *United States*, 318 U.S. 363 (1943) 11
Communications Workers v. *Illinois Bell Telephone Co.*, 12 E.P.D. ¶11,275 (N.D. Ill. 1976) 30, 46
Cook v. *Mountain States T & T Co.*, 12 FEP Cases 979 (D. Ariz. 1975) 20
Cooper Stevedoring Co., Inc. v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974) 11-12
Cort v. *Ash*, 422 U.S. 66 (1975) 5, 12, 13
Crawford v. *Western Electric Co.*, 614 F.2d 1300 (5th Cir. 1980) 33
Cutliff v. *Greyhound Lines, Inc.*, 558 F.2d 803 (5th Cir. 1977) 33

Davis v. *Passman*, 422 U.S. 228 (1979) 8, 10, 12
deHaas v. *Empire Petroleum Co.*, 286 F. Supp. 809 (D. Colo. 1968), *aff'd in part and vacated in part*, 435 F.2d 1223 (10th Cir. 1970) 45

PAGE

Denicola v. *G. C. Murphy Co.*, 562 F.2d 889 (3d Cir. 1977) 19, 20
Diamond v. *Chakrabarty*, 100 S.Ct. 2204 (1980) 37
Dunlop v. *Beloit College*, 411 F. Supp. 398 (W.D. Wisc. 1976) 20

Edmonds v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979) 10, 11, 13, 16
EEOC v. *Air Line Pilots Association*, 489 F. Supp. 1003 (D. Minn. 1980) 21, 30
EEOC v. *Bailey Co., Inc.*, 563 F.2d 439 (6th Cir. 1977), *cert. denied*, 435 U.S. 915 (1978) 41
EEOC v. *Ferris State College*, 23 FEP Cases 434 (W.D. Mich. 1980) 12, 19, 20, 25, 37, 38
El Camino Glass v. *Sunglo Glass Co.*, 1977-1 Trade Cas. ¶61,533 (N.D. Cal. 1976) 16
Employees Welfare Committee v. *Daws*, 599 F.2d 1375 (5th Cir. 1979) 35
Emporium Capwell Co. v. *Western Organization, Community Addition*, 420 U.S. 50 (1975) 29, 30
Erie Railroad Co. v. *Tompkins*, 304 U.S. 64 (1938) 10

Farmer v. *United Catering Workers Local 1064*, 19 E.P.D. ¶9075 (E.D. Mich. 1979) 46
Ford Motor Co. v. *Huffman*, 345 U.S. 330 (1953) 45

General Committee of Adjustment of Brotherhood of Locomotive Engineers for Missouri-Kansas-Texas R.R. Co. v. *Missouri-Kansas-Texas R.R. Co.*, 320 U.S. 323 (1943) 34
George's Radio, Inc. v. *Capital Transit Co.*, 126 F.2d 219 (D.C. Cir. 1942) 9
Globus, Inc. v. *Law Research Service, Inc.*, 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971) 15

PAGE

Glus v. *G. C. Murphy Co.*, 562 F.2d 880 (3d Cir. 1977) ("Glus I") 35
Glus v. *G. C. Murphy Co.*, 23 FEP Cases 83 (W.D. Pa. 1979), *aff'd*, 23 FEP Cases 86 (3d Cir. 1980) ("Glus II") 16, 31, 35, 37
Goldlawr, Inc. v. *Shubert*, 276 F.2d 614 (3d Cir. 1960) 11
Gomes v. *Brodhurst*, 394 F.2d 465 (3d Cir. 1967) 9
Gould v. *American-Hawaiian Steamship Co.*, 387 F. Supp. 163 (D.Del. 1974), *vacated and remanded on other grounds*, 535 F.2d 761 (3d Cir. 1976) 15
Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 45

Halcyon Lines v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952) 10, 11, 16
Harden v. *Illinois Bell Telephone Co.*, No. 74 C 1505 (N.D. Ill. Apr. 8, 1975) 30
Hartford Fire Insurance Co. v. *Callanan Marine Corp.*, 389 F.Supp. 436 (S.D.N.Y. 1973) 42
Heizer Corp. v. *Ross*, 601 F.2d 330 (7th Cir. 1979) 15
Hinderlider v. *LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) 10
Hodgson v. *Sagner, Inc.*, 326 F. Supp. 371 (D.Md. 1971), *aff'd sub nom., Hodgson* v. *Baltimore Regional Joint Board*, 462 F.2d 180 (4th Cir. 1972) 20
Humphrey v. *Moore*, 375 U.S. 335 (1964) 45
Hunter v. *United Air Lines*, 10 FEP Cases 787 (N.D. Cal. 1975) 20

Illinois v. *City of Milwaukee*, 406 U.S. 91 (1972) 9, 10, 34
International Brotherhood of Electrical Workers v. *Foust*, 442 U.S. 42 (1979) 39, 46
International Union of Electrical Workers v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976) 32, 42

Jenkins v. *United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968) 35
J. I. Case Co. v. *Borak*, 377 U.S. 426 (1964) 14

PAGE

Johnson v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975) 27, 34
Judson v. *Peoples Bank & Trust Co.*, 17 N.J. 67, 110 A.2d 24 (1954) 10

Kendall v. *United States*, 37 U.S. (12 Pet.) 524 (1838) 10
Kohr v. *Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975) 12

Laffey v. *Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C. 1973), 374 F. Supp. 1382 (D.D.C. 1974), *aff'd in part and vacated in part*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978) ..2, 3, 42, 43-44, 45
Laird v. *Nelms*, 406 U.S. 797 (1972) 35
Lank v. *New York Stock Exchange*, 548 F.2d 61 (2d Cir. 1977) 29
Long Island Railroad Co. v. *New York Central No. 25*, 182 F. Supp. 100 (S.D.N.Y. 1960) 42
Lorillard v. *Pons*, 434 U.S. 575 (1978) 16
Louisville & Nashville R.R. v. *Brown*, 252 F.2d 149 (5th Cir. 1958), *cert. denied*, 356 U.S. 949 (1958) 46

Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 8
Marshall v. *Tombs Janitorial Service, Inc.*, 82 L.C. ¶33,559 (W.D. Mo. 1977) 19
Mataya v. *Behm Motors, Inc.*, 409 F. Supp. 65 (E.D. Wisc. 1976) 15, 37
McCain v. *Clearview Dodge Sales, Inc.*, 574 F.2d 848 (5th Cir. 1978) 16
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 32
Miller v. *International Paper Co.*, 408 F.2d 283 (5th Cir. 1969) 32
Miree v. *DeKalb County*, 433 U.S. 25 (1977) 11, 12
Mohasco Corp. v. *Silver*, 100 S.Ct. 2486 (1980) 25, 29, 31, 37, 41, 42

PAGE

National Airlines, Inc. v. *Air Line Pilots Association, Int'l*, 431 F. Supp. 53 (S.D. Fla. 1976) 46
National Railroad Passenger Corp. v. *National Association of Railroad Passengers*, 414 U.S. 453 (1974) 19
NLRB v. *Local 57, International Union of Operating Engineers*, 201 F.2d 771 (1st Cir. 1953) 38
NLRB v. *Local 776, IATSE (Film Editors)*, 303 F.2d 513 (9th Cir.), *cert. denied*, 371 U.S. 826 (1962) 33
NLRB v. *Puerto Rico S.S. Association*, 211 F.2d 274 (1st Cir. 1954) 33
NLRB v. *Vernitron Electrical Components, Inc.*, 548 F.2d 24 (1st Cir. 1977) 33
Norman v. *Missouri-Pacific R.R. Co.*, 414 F.2d 73 (8th Cir. 1973) 45

Occidental Life Insurance Co. v. *EEOC*, 432 U.S. 355 (1977) 25, 42
Olson Farms, Inc. v. *Safeway Stores, Inc.*, 1979-2 Trade Cas. ¶62,995 (10th Cir. 1979), *en banc rehng. granted* (10th Cir. Dec. 21, 1979) 16
Oneida Indian Nation v. *County of Oneida*, 414 U.S. 661 (1974) 11
Organizations United for Ecology v. *Bell*, 446 F. Supp. 535 (M.D. Pa. 1978) 43

Peters v. *Missouri-Pacific R.R. Co.*, 483 F.2d 490 (5th Cir.), *cert. denied*, 414 U.S. 1002 (1973) 45
Peterson v. *Lehigh Valley District Council*, 453 F. Supp. 735 (E.D. Pa. 1978) 26
Piper v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977) 13, 14, 29, 38
Professional Beauty Supply, Inc. v. *National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979) 16, 37

Radio Officers' Union v. *NLRB*, 347 U.S. 17 (1954) 33, 37-38

PAGE

Reeb v. *Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975) 32
Rogers v. *Exxon Research & Engineering Co.*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978) 13, 40-41
Royal Indemnity Co. v. *Aetna Casualty and Surety Co.*, 193 Neb. 752, 229 N.W. 2d 183 (1975) 10

Sabala v. *Western Gillette, Inc.*, 516 F.2d 1251 (5th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977) 32-33
Sabre Shipping Corp. v. *American President Lines, Ltd.*, 298 F. Supp. 1339 (S.D.N.Y. 1969) 15, 16, 37, 40
Sanchez v. *Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970) 26-27
Simpson v. *Reynolds Metals Co.*, 23 FEP Cases 868 (7th Cir. 1980) 16
Sinyard v. *Foote & Davies Division of McCall Corp.*, 577 F.2d 943 (5th Cir. 1978) 20
Skinner v. *Reed-Prentice Division Package Machinery Co.*, 70 Ill. 2d 1, 374 N.E. 2d 437 (1977), *cert. denied*, 436 U.S. 946 (1978) 10
Smith v. *Alabama*, 124 U.S. 465 (1887) 10
Snyder v. *Harris*, 394 U.S. 332 (1969) 36
Southbridge Plastics Div., W.R. Grace & Co. v. *Local 759, Int'l Union of Rubber Workers*, 565 F.2d 913 (5th Cir. 1978) 36
Stebbins v. *Continental Insurance Cos.*, 442 F.2d 843 (D.C. Cir. 1971) 33
Stencel Aero Engineering Corp. v. *United States*, 431 U.S. 666 (1977) 35
Stevenson v. *International Paper Co.*, 432 F. Supp. 390 (W.D. La. 1977) 45, 46
Stier v. *Park Pontiac, Inc.*, 391 F. Supp. 397 (S.D. W.Va. 1975) 15

PAGE

Sullivan v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969) 9
Switchmen's Union v. *National Mediation Board*, 320 U.S. 297 (1943) 34

Taylor v. *Armco Steel Corp.*, 373 F. Supp. 885 (S.D. Tex. 1973) 45
Texas & Pacific R. Co. v. *Rigsby*, 241 U.S. 33 (1916) 13
Texas v. *Pankey*, 441 F.2d 236 (10th Cir. 1971) 10
Textile Workers v. *Lincoln Mills*, 353 U.S. 448 (1957) 9, 11, 12
Tipler v. *E.I. duPont deNemours & Co.*, 443 F.2d 125 (6th Cir. 1971) 27, 45
Touche Ross & Co. v. *Redington*, 442 U.S. 560 (1979) 12, 13-14, 15, 36-37
Transamerica Mortgage Advisors, Inc. v. *Lewis*, 444 U.S. 11 (1979) 12, 13, 14, 19, 21, 44-45
Travers v. *Corning Glass Works*, 76 F.R.D. 431 (S.D.N.Y. 1977) 26
Tuma v. *American Can Co.*, 367 F. Supp. 1178 (D.N.J. 1973) 20
Tunstall v. *Brotherhood of Locomotive Firemen & Enginemen, Ocean Lodge No. 76*, 323 U.S. 210 (1944) 33
TVA v. *Hill*, 437 U.S. 153 (1978) 37

Union Stock Yards Co. v. *Chicago, Burlington & Quincy R.R.*, 196 U.S. 217 (1905) 11
United Air Lines v. *Evans*, 431 U.S. 553 (1977) 29, 31, 32
United States v. *Gilman*, 347 U.S. 507 (1954) 37
United States v. *Hudson and Goodwin*, 11 U.S. (7 Cranch) 32 (1812) 10
United States v. *Republic Steel Corp.*, 362 U.S. 482 (1960) 9
United States v. *Standard Oil Co.*, 332 U.S. 301 (1947) 9, 11
United States v. *Yellow Cab Co.*, 340 U.S. 543 (1951) 9

PAGE

Usery v. *Beloit College*, 12 E.P.D. ¶11,203 (W.D. Wisc. 1976) 19, 20, 25

Verzosa v. *Merrill Lynch, Pierce, Fenner & Smith*, 589 F.2d 974 (9th Cir. 1978) 32

Wallace v. *International Paper Co.*, 426 F. Supp. 352 (W.D. La. 1977) 41
Wallis v. *Pan American Petroleum Corp.*, 384 U.S. 63 (1966) 11
Wassel v. *Eglowsky*, 399 F. Supp. 1330 (D.Md. 1975), *aff'd*, 542 F.2d 1235 (4th Cir. 1976) 15
Weinberger v. *Salfi*, 422 U.S. 749 (1975) 34, 35
Wheaton v. *Peters*, 33 U.S. (8 Pet.) 591 (1834) 10
Wheeldin v. *Wheeler*, 373 U.S. 647 (1963) 8-9, 10, 11
Wiggins v. *Spector Freight Systems, Inc.*, 583 F.2d 882 (6th Cir. 1978) 33
Willamette Iron Bridge Co. v. *Hatch*, 125 U.S. 1 (1888) 10
Williams v. *General Foods Corp.*, 492 F.2d 399 (7th Cir. 1974) 33
Wilson P. Abraham Construction Corp. v. *Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979), *petition for cert. filed sub nom. Texas Industries, Inc.* v. *Radcliffe Materials, Inc.*, 48 U.S.L.W. 3570 (U.S. Mar. 4, 1980) (No. 79-1144) 16, 30-31
Wirtz v. *Malthor, Inc.*, 391 F.2d 1 (9th Cir. 1968) 25
Wyandotte Transportation Co. v. *United States*, 389 U.S. 191 (1967) 9

Yakus v. *United States*, 321 U.S. 414 (1944) 36
Younger v. *Glamorgan Pipe & Foundry Co.*, 418 F. Supp. 743 (W.D. Va. 1976), *vacated on other grounds*, 561 F.2d 563 (4th Cir. 1977) 30

PAGE

Constitution and Statutes:

Age Discrimination in Employment Act, 29 U.S.C. §§621-634 41
29 U.S.C. §626(b) 21

Civil Rights Acts
42 U.S.C. §1981 (1870) 34
42 U.S.C. §1982 (1866) 9

Consumer Credit Protection Act, 15 U.S.C. §§1601 *et seq.* 15-16

Equal Pay Act of 1963, 29 U.S.C. §206(d) ..... *passim*
29 U.S.C. §206(d)(1) 2
29 U.S.C. §206(d)(3) 17

Equal Pay Act of 1963, Pub.L. 88-38, §2, 77 Stat. 56, *reprinted in* (1963) U.S. Code Cong. & Ad. News 59 24

Fair Labor Standards Act, 29 U.S.C. §§201 *et seq.* 1, 17, 19, 21, 22, 24
29 U.S.C. §202(a)(3) 24
29 U.S.C. §203(a) 19
29 U.S.C. §203(d) 19
29 U.S.C. §211(a) 17
29 U.S.C. §216(a) 17-18
29 U.S.C. §216(b) 18
29 U.S.C. §216(c) 17, 18

Fair Labor Standards Amendments of 1974, Pub.L. No. 93-259, §6(d)(1), 88 Stat. 61 (amending 29 U.S.C. §216(b) (Supp. 1980)) 18

Federal Tort Claims Act, 28 U.S.C. §§2671 *et seq.* 9
28 U.S.C. §2675(a) 35

Interstate Commerce Act, 49 U.S.C. §301 *et seq.* 16

Judiciary and Judicial Procedure Act
28 U.S.C. §1331 ..... 4, 7, 33-34, 35, 36
28 U.S.C. §1333 10
28 U.S.C. §1337 34

PAGE

Labor Management Relations Act, 29 U.S.C. §§141 *et seq.*
29 U.S.C. §185 ..... 9, 34

Motor Vehicle Information and Cost Savings Act, 15 U.S.C. §§1901 *et seq.* 15

National Labor Relations Act, 29 U.S.C. §§151-168 33

Railway Labor Act, 45 U.S.C. §§151 *et seq.* 44, 45, 46

Rivers and Harbors Act of 1899, 33 U.S.C. §§401 *et seq.* 9

Securities Act of 1933, 15 U.S.C. §§77a *et seq.* 15, 16
15 U.S.C. §77k(f) 15

Securities & Exchange Act of 1934, 15 U.S.C. §§78a *et seq.* 15
15 U.S.C. §78i(e) 15
15 U.S.C. §78r(b) 15

Social Security Act, 42 U.S.C. §§401 *et seq.* 35

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.* ..... *passim*
42 U.S.C. §2000e-2(a) 2
42 U.S.C. §2000e-3 29
42 U.S.C. §2000e-5(b) 26, 27, 28
42 U.S.C. §2000e-5(c) 26
42 U.S.C. §2000e-5(f)(1) 26, 28, 43
42 U.S.C. §2000e-5(g) 27

United States Constitution
Amend. IV 9
Article III 10

Rules and Regulations:

Reorganization Plan No. 1 of 1978, §1, 43 Fed. Reg. 19,807, 92 Stat. 3781 17

PAGE

Legislative History:

Legislative History of the Equal Pay Act of 1963
H.R. Rep. No. 1714, 87th Cong., 2d Sess. (1962).... 21
H.R. Rep. No. 309, Supplemental Views, 88th Cong., 1st Sess., *reprinted in* (1963) U.S. Code Cong. & Ad. News 687 19
108 Cong. Rec. 10503 (1962) 24
108 Cong. Rec. 14748 (1962) 24
108 Cong. Rec. 14752-53 (1962) 24
108 Cong. Rec. 14753 (1962) 24
108 Cong. Rec. 14756 (1962) 24
108 Cong. Rec. 14757 (1962) 24
108 Cong. Rec. 14765-66 (1962) 21
108 Cong. Rec. 22084 (1962) 24
109 Cong. Rec. 7223 (1963) 24
109 Cong. Rec. 8916 (1963) 22
109 Cong. Rec. 9195 (1963) 19, 22
109 Cong. Rec. 9196 (1963) 23
109 Cong. Rec. 9197 (1963) 22
109 Cong. Rec. 9198 (1963) 22, 23-24
109 Cong. Rec. 9203 (1963) 22, 24
109 Cong. Rec. 9204 (1963) 22, 24
109 Cong. Rec. 9207 (1963) 22, 24
109 Cong. Rec. 9208 (1963) 23
109 Cong. Rec. 9209 (1963) 23, 24
109 Cong. Rec. 9212 (1963) 22
109 Cong. Rec. 9215 (1963) 23
S. 2494, 87th Cong., 1st Sess. (1961) (unenacted) 21
H.R. 11677, 87th Cong., 2d Sess. (1962) (unenacted) 21

Legislative History of Title VII of the 1964 Civil Rights Act
H.R. Rep. No. 1370, 87th Cong., 2d Sess. (1962).... 25
93 Cong. Rec. 2688 (1947) 25
110 Cong. Rec. 2602 (1964) 25

PAGE

110 Cong. Rec. 6549 (1964) 25
110 Cong. Rec. 7207 (1964) 27
110 Cong. Rec. 7420 (1964) 27
110 Cong. Rec. 14188 (1964) 28
110 Cong. Rec. 14191 (1964) 28
S. 984—H.R. 2824, 80th Cong., 1st Sess. (1947) (unenacted) 25
H.R. 10144, 87th Cong., 2d Sess. (1962) (unenacted) 25

Miscellaneous:

Resolution To Encourage Voluntary Affirmative Action (issued by EEOC, Apr. 1, 1980), 48 U.S.L.W. 2660 40

Restatement 2d Torts, §886A, Comment (g) (1979) 36

W. Prosser, Law of Torts, §50, 306-307 (4th ed. 1971) 10, 36

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1056

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

AND

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

Statutory Provisions

Pertinent provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, in which the Equal Pay Act of 1963, 29 U.S.C. § 206(d), is incorporated, and of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, which were not included in the petition for certiorari, are set forth in Supplemental Appendix A, annexed hereto.

Statement of the Case

This case presents an attempt by Northwest Airlines, Inc. ("Northwest") to obtain contribution from the Air Line Pilots Association, International ("ALPA") and the Transport Workers Union of America ("TWU"), former collective bargaining representatives of flight attendants employed by Northwest, for Northwest's financial liability in *Laffey* v. *Northwest Airlines, Inc.*,[1] under two comprehensive, regulatory statutes—the Equal Pay Act of 1963 ("EPA")[2] and Title VII of the Civil Rights Act of 1964 ("Title VII")[3]—which do not contain a provision for contribution.

A. *The Underlying Title VII and EPA Litigation*

Laffey was commenced solely against Northwest, following the filing of charges of discrimination with the EEOC solely against Northwest. After trial, Northwest was held to have engaged in widespread violations of the EPA and Title VII against its female flight attendants, principally due to its differential treatment of "pursers" and "cabin attendants." From the inception of the purser position in 1947, Northwest unilaterally "adhered to an undeviating practice of restricting purser jobs to men alone." 567 F.2d at 437; 366 F. Supp. at 765 (¶6), 772-73 (¶37).[4] This "company policy," never contained in a collective bargain-

---

[1] 366 F. Supp. 763 (D.D.C. 1973) and 374 F. Supp. 1382 (D.D.C. 1974), *aff'd in part and vacated in part*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

[2] 29 U.S.C. §206(d)(1).

[3] 42 U.S.C. §2000e-2(a).

[4] While Northwest explains this as "[i]n accordance with the maritime tradition" (NWA brief, p. 3), neither the District Court nor the Court of Appeals ascribed such a reason. 366 F. Supp. at 772 (¶37). The reason, instead, was very simple: "the company 'prefers males and intends to have them.'" 567 F.2d at 438; 366 F. Supp. at 778 (¶45).

ing agreement, "created a *status quo* under which pursers were more highly paid than stewardesses." 567 F.2d at 447. While Northwest asserts that "[i]t is unthinkable that the pay differential would have persisted as long as it did if the unions had protested the differential as discriminatory" (NWA brief, p. 38), in fact the Court of Appeals in *Laffey* found that union efforts "to win better treatment for stewardesses" met with "stiff resistance from NWA." 567 F.2d at 447.

B. *Northwest's Belated Attempts to Assert Claims Against the Unions*

No union conduct of any kind was held in *Laffey* to violate any law.[5] The sole liability determined was Northwest's. There was no suggestion of any alleged union misconduct—even after ALPA had been joined in the case at plaintiffs' request—until Northwest belatedly attempted to amend its answer to assert a cross-claim against ALPA for contribution "almost four years after the action was commenced, more than three years after NWA had answered the complaint, almost one and one-half years after trial was completed and several . . . months after the court rendered its findings and judgment." 567 F.2d at 477. The District Court rejected Northwest's untimely effort, and the Court of Appeals affirmed, emphasizing Northwest's extreme tardiness and the obvious "hardship on the parties" which would have followed from allowing Northwest to pursue its dilatory claims. 567 F.2d at 477-78.

After *Laffey* was appealed to the Court of Appeals, Northwest attempted to cure its long delay by filing the present action seeking contribution toward its liability

---

[5] Northwest's extensive discussion in its "Statement" of alleged union conduct in negotiations is self-serving and inaccurate, and is unsupported by the record in this case. The *Laffey* findings, to which Northwest repeatedly refers, while binding on Northwest, cannot be offered against ALPA or TWU, since neither union participated in the trial of the case. *See* 567 F.2d at 476-78.

under the Equal Pay Act and Title VII in *Laffey*. The complaint identified no other alleged sources of union liability.

C. *The Decision of the District Court*

The District Court granted ALPA's motion to dismiss Northwest's claim for EPA contribution, citing the uniform judicial decisions rejecting such a claim. (P.A., pp. 4b-7b).[6] ALPA's motion to dismiss the claim for Title VII contribution was denied solely because the Court concluded that the federal common law provides a right to contribution applicable to Title VII liability, "at least under some circumstances." (P.A., p. 18b). The Court held that this "federal common law" provided jurisdiction under 28 U.S.C. § 1331. (P.A., p. 8b).

D. *The Decision of the Court of Appeals*

1. Equal Pay Act Contribution

The Court of Appeals affirmed the dismissal of Northwest's claim for Equal Pay Act contribution, "because we find such a right inconsistent with both the statute's language and purpose." 606 F.2d at 1353. (P.A., p. 6d). The Court emphasized that its "conclusion is also in accord with a persuasive and well-reasoned line of precedent." 606 F.2d at 1355. (P.A., p. 11d).

2. Title VII Contribution

The Court of Appeals found it premature—and perhaps ultimately unnecessary—to consider the claim for Title VII contribution because Northwest's possible laches might bar its claim. The Court remanded for consideration of laches, and indicated it would address the merits of the Title VII contribution claim if the District Court did not dismiss the claim for laches:

---

[6] The decisions of the Courts below appear in the Appendix to the Petition, cited as "P.A."

"If the trial court finds that laches is not a bar, the defendants' appeal may be renewed." 606 F.2d at 1356. (P.A., p. 13d).

Before the District Court could proceed as directed to consider the laches question, Northwest petitioned this Court for review.

Summary of Argument

I

Northwest seeks contribution for its liability under Title VII and the Equal Pay Act. Neither statute, by its terms, provides for contribution. Northwest's inability to establish any statutory or constitutional basis for its claim requires dismissal of the action.

A. Federal courts are not common law tribunals. They may only fashion common law in limited areas pursuant to constitutional or statutory authorization. Where, as here, the suit is between private litigants and the claim presented directly involves federal statutes, the courts may only fashion rules of decision to the extent authorized by the particular statutes. A right to Title VII or EPA contribution must find its authorization in those statutes, or it does not exist.

B. Title VII and the EPA delineate specific means for their enforcement. The question of whether the statutes create additional enforcement mechanisms must be resolved on the basis of congressional intent, to be discerned in accordance with the guidelines set forth in *Cort* v. *Ash*, 422 U.S. 61 (1975) and its progeny.

II

The text and legislative histories of Title VII and the EPA demonstrate that Congress did not intend the courts to recognize an employer right of contribution against unions for liability under those statutes.

A. Congress has provided for contribution in other regulatory statutes. Its failure to so provide in Title VII and the EPA indicates congressional intent not to provide contribution for liability under the two statutes.

B. The text and legislative history of the EPA demonstrate that the statute bars private damage actions against unions for violations of the statute, whether by contribution or otherwise. The lower courts have unanimously agreed. Contribution for EPA liability would conflict with the EPA policy of discouraging unfair competition based on wage discrimination by allowing discriminatory employers to retain part of the benefits of their discriminatory practices.

C. Northwest's effort to establish the unions' Title VII liability by extra-statutory means contravenes the wording and intent of the exclusive statutory enforcement scheme. A critical component of the compromise that produced Title VII's enforcement scheme is the absolute requirement that all respondents be afforded the *opportunity* to conciliate prior to suit. All claims of Title VII violations must initially be referred to the Equal Employment Opportunity Commission. Title VII lawsuits may only be filed against "respondents" previously named in EEOC charges filed by aggrieved persons or the EEOC, and the power of the courts to remedy Title VII violations may only be exercised against such "respondents." The legislative history reflects that this enforcement scheme was to be the exclusive means of adjudicating Title VII liability, and this Court has consistently implemented that legislative intent.

D. Northwest's failure to satisfy Title VII's jurisdictional prerequisites requires dismissal of its claim for contribution for Title VII liability. Its attempt to invoke jurisdiction under 28 U.S.C. § 1331 by characterizing its action as a "common law" claim is without merit. Northwest's claim requires the establishment of the unions' Title VII liability. Title VII's limiting jurisdictional provisions preclude resort to the general jurisdictional grant in 28 U.S.C. § 1331.

E. Contribution for Title VII and EPA liability cannot be created by the courts on the basis of policy considerations. Such concerns are appropriately addressed, if at all, to Congress. Moreover, there are strong policy considerations against contribution. A denial of contribution will deter future wrongful conduct because a party will be unable to shift liability if it violates the law. Contribution against unions will discourage suits by aggrieved individuals—"private attorneys general"—because they will, as a practical matter, be forced to fund their own back pay awards through depletion of their unions' treasuries. Contribution will also discourage unions from undertaking affirmative efforts, including the filing of Title VII suits on behalf of their members, to eradicate discrimination, because the great costs of defending contribution claims, even if those claims prove unsuccessful, will divert the limited available resources from the pursuit of such efforts.

Contribution, as presented in this action, will deprive defendants of the basic "due process" protections which Congress specifically included in Title VII to assure fair treatment to all potential respondents, including the opportunity to conciliate claims of Title VII violations prior to possible litigation. Moreover, contribution would directly conflict with Title VII's requirement for the prompt assertion of claims of Title VII violations, particularly where, as here, a statutory violator has consciously delayed asserting any contribution claim until after the underlying statutory liabilities have already been determined.

F. Northwest's complaint seeks contribution solely for its liability under Title VII and the EPA. It would entirely subvert congressional intent to allow Northwest to bypass the bars to contribution under those statutes by invoking another source of possible underlying liability. Northwest's effort, if successful, would encourage widespread efforts by litigants to avoid statutory restrictions on claims by simply couching their claims as "common law" rights.

ARGUMENT

I.

A Right to Contribution for Liability Under Title VII or the Equal Pay Act May Be Judicially Established Only If Congress Intended to Create Such Right.

Northwest, in its capacity as a proven violator of Title VII and the Equal Pay Act, asserts a cause of action to recover contribution from other parties who allegedly participated in its misconduct. Since no statute expressly provides this cause of action, the claim raises a threshold question of what "recognized legal rights," if any, provide a basis for Northwest's "claim for relief." *Davis* v. *Passman,* 442 U.S. 228, 237 (1979).

Disclaiming an implied right to contribution under either statute (NWA brief, p. 11), Northwest characterizes contribution as a "federal common law right" (*id.,* p. 51), derived from "the developing law of remedies" (*id.,* p. 11), and presumably applicable to all federal liabilities. This approach fundamentally misconceives the law-making functions of the federal judiciary. The remedial powers of the court cannot be invoked unless "recognized legal rights" have been violated.[7] Northwest's inability to establish a

[7] *See Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137, 154 (1803); *Wheeldin* v. *Wheeler,* 373 U.S. 647, 651 n.5 (1963) (distinguishing

statutory or constitutional basis for its claimed right to contribution requires dismissal of this action.

A. *There Is No Federal Common Law From Which a Right to Contribution May Be Derived Independent of Statutory Authorization.*

Federal courts are fundamentally distinct from their state counterparts which function as common law tribunals. *See United States* v. *Standard Oil Co.*, 332 U.S. 301, 313 (1947).[8] Federal courts may only fashion "federal common

---

the creation of federal common law rights from the fashioning of remedies).

In each of the cases cited by Northwest for "the power of the federal judiciary to supplement express remedies" (NWA brief, p. 12), the claim rested on "recognized legal rights." In *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), the source of rights was 42 U.S.C. §1982. *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957), involved the courts' implementation of the general substantive rule provided by §301 of the Labor Management Relations Act, 29 U.S.C. §185. *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967) and *United States* v. *Republic Steel Corp.*, 362 U.S. 482 (1960), involved the implication of causes of action under the Rivers and Harbors Act of 1899, 33 U.S.C. §401 *et seq.* *See Cannon* v. *University of Chicago*, 441 U.S. 677, 690 n.13 (1979). *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972), involved direct authorization for judicial law-making from the Constitution, and *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), the judicial implication of remedies to effectuate substantive Fourth Amendment rights operative by their own force.

[8] The state court contribution cases cited by Northwest (NWA brief, App. A) are thus inapposite. Similarly, the cases cited in which federal courts have applied state common law rules of contribution have no bearing on the power of the courts to decide federal cases. *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951) (Pennsylvania contribution rule applied in accordance with Federal Tort Claims Act); *Gomes* v. *Brodhurst*, 394 F.2d 465 (3d Cir. 1967) (Virgin Islands Law); and *George's Radio, Inc.* v. *Capital Transit Co.*, 126 F.2d 219 (D.C. Cir. 1942) (local District of Columbia common law). It should further be noted that despite the broad common law powers of state courts, in only ten jurisdictions (the District of Columbia, Iowa, Louisiana, Maine, Minnesota, Pennsylvania, Tennessee, Wisconsin, Illinois, Nebraska) was contribution initially adopted by judicial rather than legisative action.

(footnote continued on following page)

law" in limited, specialized areas where authorized by specific constitutional or statutory authorization.[9]

For example, the Constitution has been construed to authorize the development of federal common law to resolve interstate disputes,[10] and to enforce constitutional protections.[11] The Article III grant of admiralty jurisdiction, presently implemented by 28 U.S.C. §1333, has also been construed to empower courts to continue the centuries-old tradition of judge-made admiralty law.[12] The presence of federal governmental interests has been held to require the application of federal rules, *e.g.*, where "substantial rights or duties of the United States hinge on [the] out-

---

(footnote continued from preceding page)
See W. Prosser, The Law of Torts, §50, 306-07 (4th ed. 1971); *Skinner* v. *Reed-Prentice Div. of Package Machinery Co.*, 70 Ill.2d 1, 374 N.E. 2d 437 (1977), *cert. denied*, 436 U.S. 946 (1978); *Royal Indemnity Co.* v. *Aetna Casualty & Surety Co.*, 193 Neb. 752, 229 N.W. 2d 183 (1975). The decision in *Judson* v. *Peoples Bank & Trust Co.*, 17 N.J. 67, 110 A.2d 24 (1954) (NWA brief, p. 12) applied a statutory contribution provision and did not judicially create a rule of contribution.

[9] *Wheeldin* v. *Wheeler*, *supra*, 373 U.S. 647. The Court has repeatedly recognized that apart from implementation of the Constitution and federal statutes, there is no common law of the United States. *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938) ("There is no federal general common law"); *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1, 8 (1888); *Smith* v. *Alabama*, 124 U.S. 465, 478-79 (1887); *Kendall* v. *United States*, 37 U.S. (12 Pet.) 524, 621 (1838); *Wheaton* v. *Peters*, 33 U.S. (8 Pet.) 591, 658 (1834). *See also United States* v. *Hudson and Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

[10] *See, e.g., Illinois* v. *Milwaukee*, 406 U.S. at 103-107; *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938); *Texas* v. *Pankey*, 441 F.2d 236, 240-41 (10th Cir. 1971).

[11] *Carlson* v. *Green*, 100 S.Ct. 1468 (1980); *Davis* v. *Passman*, *supra*, 442 U.S. 228; *Bivens* v. *Six Unknown Named Agents*, *supra*, 403 U.S. 388.

[12] *See, e.g., Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 259, 271-272 (1979); *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285 (1952).

come," *Miree* v. *DeKalb County*, 433 U.S. 25, 31 (1977),[13] or where international relations[14] or title to Indian lands[15] are at stake.

In contrast, where private parties advance claims directly involving federal statutes, judicial authority to fashion rules of decision exists only to the extent authorized by the pertinent staute.[16]

This approach has been applied where contribution is sought for statutory liabilities, as demonstrated by the leading maritime contribution cases, *Halcyon Lines, supra*, 342 U.S. 282, and *Cooper Stevedoring Co., Inc.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974). Even though admiralty had recognized contribution since the twelfth century,[17] the Court in *Halcyon Lines* refused to permit contribution against a party whose liability was controlled by statute, where Congress had "stopped short of approving the rule of contribution. . . ." 342 U.S. at 287. In *Cooper Stevedor-*

---

[13] *See, e.g., Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943). Even where the Court determines that federal rules must necessarily govern because government operations are at issue, it will decline to create any substantive rights or remedies where to do so would be contrary to congressional intent. *United States* v. *Standard Oil Co.*, 332 U.S. at 314-16.

In suits between private parties which do not substantially affect government interests, there is no such basis for the fashioning of federal common law. *Bank of America Nat'l. Trust and Savings Ass'n.* v. *Parnell*, 352 U.S. 29, 33 (1956); *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966).

[14] *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423-27 (1964).

[15] *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 666-75 (1974).

[16] *See Textile Workers* v. *Lincoln Mills*, 353 U.S. at 457; *Wheeldin* v. *Wheeler*, 373 U.S. at 651-52.

[17] In contrast, a right to contribution was not recognized at common law. *Union Stock Yards Co.* v. *Chicago B & Q R. Co.*, 196 U.S. 217, 224 (1905); *Halcyon Lines*, 342 U.S. at 285. *See also Goldlawr, Inc.* v. *Shubert*, 276 F.2d 614, 616 (3d Cir. 1960).

ing, the Court reaffirmed that it would be improper to allow contribution even in admiralty where there is any "possibility" that "contribution might be inconsistent" with a statute. 417 U.S. at 112. *See Edmonds,* 443 U.S. at 273.[18]

Similarly, a "right" to Title VII or EPA contribution must find its authorization in those statutes, or it does not exist. *EEOC* v. *Ferris State College,* 23 FEP Cases 434, 442 (W.D.Mich. 1980) ("If the [EPA] itself confers no right of contribution favoring employers, then no such right exists under federal common tort law. . . .")

B. *A Statute Cannot Be Found to Authorize Contribution If Congress Did Not Intend to Create Such a Right.*

Title VII and the EPA delineate substantive rules and the means for enforcement. Neither provides for contribution. Whether these statutes authorize the courts to recognize additional enforcement mechanisms must be determined in accordance with the guidelines established in *Cort* v. *Ash,* 422 U.S. 66 (1975) and its progeny. *Davis* v. *Passman,* 442 U.S. at 241. Under these guidelines, "the dispositive question remains whether Congress intended to create any such remedy." *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11, 24 (1979); *Touche Ross & Co.* v. *Redington,* 442 U.S. 560, 568 (1979).[19]

---

[18] No statutory duties or liabilities were involved in *Kohr* v. *Allegheny Airlines, Inc.,* 504 F.2d 400 (7th Cir. 1974), *cert. denied,* 421 U.S. 978 (1975) (NWA brief, p. 14). The only possible rationale for the fashioning of a federal rule of contribution in *Kohr* for aircraft disasters was the overriding interest of the federal government in the regulation of matters pertaining to interstate air space and the presence of the government as a party. Even as so construed, *Kohr* appears to have been wrongly decided in light of this Court's subsequent decision in *Miree* v. *DeKalb,* 433 U.S. at 31-32.

[19] The question of supplementing a statutory enforcement scheme is entirely different from the issue presented in *Textile Workers* v. *Lincoln Mills, supra,* 353 U.S. 448, where the statute under consideration provided a general substantive rule, but left to the courts the task of providing specific mechanisms to implement that rule. Nevertheless, the critical consideration remains the same in

The cases have identified several indicia bearing on the determination of legislative intent. First, and most obviously, the question of statutory construction begins "by looking to the language of the statute itself." *Cannon,* 441 U.S. at 689 (1979). A second indicium is whether Congress has expressly provided in other legislation for the specific right or remedy not expressly found in the statute under consideration. If it has, then it is unlikely that Congress intended to imply such a right or remedy in the silent statute.[20] Such silence is especially significant where the federal decisional law at the time of the enactment of the statute has refused to recognize the right or remedy in question in the absence of statutory provision.[21] A third consideration is the comprehensiveness of the underlying statute. The enactment of a detailed statutory scheme, specifying rights and remedies, and the means by which they are to be determined, generally indicates that Congress did not intend to create an additional right or remedy. *Transamerica,* 444 U.S. at 19. Another indicator is whether the party seeking relief is "one of the class for whose *especial* benefit the statute was enacted." *Cort,* 442 U.S. at 78, *quoting Texas & Pacific R. Co.* v. *Rigsby,* 241 U.S. 33, 39 (1916). Where the party asserting the claim is within the class whose conduct Congress intended to regulate by the statute at issue, congressional intent to confer rights or remedies upon that party cannot be inferred. *Piper* v. *Chris-Craft Industries, Inc.,* 430 U.S. 1, 37 (1977).

Where congressional intent cannot be readily ascertained, and the party seeking relief is not one of the "especial" intended beneficiaries, "the inquiry ends there,"

---

both situations: whether Congress authorized the courts to fashion the rules which the plaintiff is seeking.

[20] *Touche Ross,* 442 U.S. at 572; *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240, 247, 263-64, 269 (1975). *See Rogers* v. *Exxon Research & Engineering Co.,* 550 F.2d 834, 841 (3d Cir. 1977), *cert. denied,* 434 U.S. 1022 (1978).

[21] *See Edmonds,* 443 U.S. at 273-74 n.32.

Touche Ross, 442 U.S. at 576, and the relief cannot be granted.[22] Even if the party can establish its status as an "especial" intended beneficiary, the right it seeks will not be implied unless it is "necessary to effectuate Congress' goals." *Piper,* 430 U.S. at 26.[23]

As discussed below, the structure and legislative history of the EPA and Title VII confirm that Congress did not intend to provide a right of contribution for enforcement of liabilities under those statutes.

II.

There Is No Basis for Contribution for Title VII or Equal Pay Act Liability.

Title VII and the EPA, unlike certain other statutes regulating private federal conduct, provide comprehensive schemes defining unlawful conduct and delineating exclusive means for enforcement. Neither statute provides for contribution. Contribution would be inconsistent with the text and legislative history of the statutes, and must therefore be rejected.

---

[22] *Touche Ross,* 442 U.S. at 579-80 (Brennan, J., concurring) ("when, as here, a statute clearly does not 'create a federal right in favor of the plaintiff,' . . . i.e., when the plaintiff is not 'one of the class for whose *especial* benefit the statute was enacted,' . . . and when there is also in the legislative history no 'indication of legislative intent, explicit or implicit, . . . to create such a remedy,' . . . the remaining two *Cort* factors cannot by themselves be a basis for implying a right of action.") (citations omitted).

[23] To the extent *J.I. Case Co.* v. *Borak,* 377 U.S. 426 (1964), may be read to suggest that a right may be implied simply by demonstrating that it "provides a necessary supplement" to the statutory enforcement scheme, the Court has indicated that this is no longer the applicable standard:

> 'in a series of cases since *Borak* we have adhered to a stricter standard for the implication of private causes of action." *Touche Ross,* 442 U.S. at 578.

See Cannon, 441 U.S. at 698; *Transamerica,* 444 U.S. at 15-16.

A. *The Absence of Provisions for Contribution in Title VII and the Equal Pay Act Demonstrates Congressional Intent Not to Provide for Contribution for Liabilities Under Those Statutes.*

The clearest indication that Congress did not intend contribution to be available to violators of Title VII or the EPA is that neither statute provides for contribution.

Congress has specifically provided for contribution among joint statutory violators where it believes contribution is necessary and appropriate, as it has in the Federal Securities Acts.[24] These specific provisions demonstrate that "when Congress wished to provide" a right of contribution, "it knew how to do so and did so expressly." *Touche Ross,* 442 U.S. at 572. The absence of such provisions in other federal regulatory schemes is therefore significant: "no such right should be implied." *Sabre Shipping Corp.* v. *American President Lines, Ltd.,* 298 F.Supp. 1339, 1345 (S.D.N.Y. 1969). Accordingly, contribution has been denied for liability arising under the Federal Motor Vehicle Information and Cost Savings Act,[25] the Consumer Credit

---

[24] Section 11(f) of the Securities Act of 1933, 15 U.S.C. §77k(f), and Sections 9(e) and 18(b) of the Securities and Exchange Act of 1934, 15 U.S.C. §§78i(e), r(b). The explicit provision for contribution has led courts to allow contribution in cases involving implied liabilities under the securities laws, as in three of the "federal conrtibution" cases cited by Northwest. *Heizer Corp.* v. *Ross,* 601 F.2d 330, 332 (7th Cir. 1979) ("when it occurred to Congress to do so, it expressed its desire that contribution be available among joint securities tortfeasors."); *Gould* v. *American-Hawaiian Steamship Co.,* 387 F. Supp. 163, 168-69 (D. Del. 1974), *vacated and remanded on other grounds,* 535 F.2d 761 (3d Cir. 1976); *Globus, Inc.* v. *Law Research Service, Inc.,* 318 F. Supp. 955, 958 (S.D.N.Y. 1970), *aff'd per curiam,* 442 F.2d 1346 (2d Cir.), *cert. denied,* 404 U.S. 941 (1971). *See also Wassel* v. *Eglowsky,* 399 F. Supp. 1330 (D. Md. 1975), *aff'd,* 542 F.2d 1235 (4th Cir. 1976).

[25] 15 U.S.C. §§1901 *et seq.* *See Mataya* v. *Behm Motors, Inc.,* 409 F.Supp. 65, 70 (E.D.Wisc. 1976); *Stier* v. *Park Pontiac, Inc.,* 391 F.Supp. 397, 401 (S.D.W.Va. 1975).

Protection Act,[26] the Interstate Commerce Act,[27] and the antitrust laws.[28]

Congressional failure to provide for contribution in statutes enacted after the Securities Acts, like Title VII and the EPA, is particularly significant,[29] because the state of decisional federal law at the time the statutes were enacted did not recognize a right of contribution.[30] The absence of contribution provisions in Title VII and the EPA must be viewed as a purposeful decision to bar contribution, and is dispositive of Northwest's claim.

---

[26] 15 U.S.C. §§1601 *et seq.* *See McCain* v. *Clearview Dodge Sales, Inc.*, 574 F.2d 848 (5th Cir. 1978).

[27] 49 U.S.C. §§301 *et seq.* *See Carriers Insurance Exchange* v. *Truck Insurance Exchange*, 310 F.2d 653, 657-59 (4th Cir. 1962).

[28] *See, e.g., Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979); *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979-2 Trade Cas. ¶62,995, *en banc rehng. granted* (10th Cir. Dec. 21, 1979); *Sabre Shipping, supra*, 298 F.Supp. 1339; *El Camino Glass* v. *Sunglo Glass Co.*, 1977-1 Trade Cas. ¶61,533 (N.D.Cal. 1976); *Baughman* v. *Cooper-Jarrett, Inc.*, 391 F.Supp. 671, 678 n.3 (W.D.Pa. 1975), *aff'd and modified on other grounds*, 530 F.2d 529 (3d Cir.), *cert. denied*, 429 U.S. 825 (1976). *Contra, Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979).

[29] *Glus* v. *G.C. Murphy Co.*, 23 FEP Cases 86, 99-100 (3d Cir. 1980) ("Glus II") (Sloviter, J., dissenting).

[30] *Halcyon Lines*, 342 U.S. at 285. Knowledge of the state of the law is attributable to Congress, *see Cannon*, 441 U.S. at 696-98; *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978), and Congress is presumed to have acted in contemplation of the then existing state of the law. *Edmonds*, 443 U.S. at 273-74 n.32. Assuming *arguendo* that the state of the federal law of contribution has changed since the enactment of Title VII and the EPA, it would be entirely inappropriate to retroactively attribute to Congress an intent, by its silence, to recognize a right which did not then exist. *See Simpson* v. *Reynolds Metals Co.*, 23 FEP Cases 868, 880 (7th Cir. 1980).

B. *The Text and Legislative History of the Equal Pay Act Bar Contribution.*

Congress' decision to incorporate the EPA into the comprehensive enforcement scheme of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §201 *et seq.*, demonstrates that it did not intend to subject unions to claims for contribution by discriminatory employers. The lower courts have uniformly held that the EPA precludes any private damage actions against unions.

1. The Statute Precludes Private Damage Claims Against Unions for EPA Liability.

The FLSA provides several distinct enforcement mechanisms, some generally applicable to all "persons" who violate the Act, others applicable only to "employers."

The statute vests the Administrator of the Wage and Hour Division of the Department of Labor[31] with authority to investigate any industry covered by the Act "to determine whether any *person* has violated any provision of this chapter" (emphasis added).[32] The Secretary of Labor is granted exclusive authority to sue to enjoin violation of the Act,[33] and "may bring an action . . . to recover . . . wages or unpaid overtime compensation[34] and an additional equal amount as liquidated damages." [35] The Department of Jus-

---

[31] Pursuant to Section 1 of Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19,807, 92 Stat. 3781, the statutory functions and powers described in the text relating to enforcement of the Equal Pay Act by the Secretary of Labor have been transferred to the Equal Employment Opportunity Commission.

[32] 29 U.S.C. §211(a).

[33] *Id.*

[34] "For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection [the Equal Pay Act] shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter." 29 U.S.C. §206(d)(3).

[35] 29 U.S.C. §216(c).

tice may institute criminal proceedings against "[a]ny *person* who willfully violates," *inter alia,* the Equal Pay Act. 29 U.S.C. §216(a) (emphasis added).

Section 216(b)—the only section of the FLSA providing for civil enforcement by private parties—authorizes "employees" to bring actions to recover "unpaid minimum wages" or "unpaid overtime compensation," an "additional equal amount as liquidated damages," and "reasonable attorney's fee to be paid by the defendant." [36] Unlike the criminal proceedings of Section 216(a) and suits for injunctive relief by the Secretary, private employee actions may be brought solely against employers:

> "Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected. . . . An action to recover [such] liability . . . may be maintained against any *employer* (including a public agency)[37] in any Federal or State court of competent jurisdiction by any one or more employees. . . ." 29 U.S.C. §216(b) (emphasis added).

The use of the term "employer"—rather than "person"—in Section 216(b) is highly significant. The FLSA "is carefully drawn and every term is used as a term of art." *Bowe* v. *Judson C. Burns,* 137 F.2d 37, 38 (3d Cir. 1943). "Person" is defined to include "any organized group of per-

---

[36] The statute limits this right of action. The right terminates upon the filing of a complaint by the Secretary of Labor. 29 U.S.C. §§216(b), (c). Moreover, an employee can only become a party plaintiff after first filing a written consent with the court. 29 U.S.C. §216(b).

[37] Congress added the phrase "against any employer (including a public agency)" in 1974, Fair Labor Standards Amendments of 1974, Pub.L.No. 93-259, §6(d)(1), 88 Stat. 61, confirming that the provisions of subsection 216(b) are limited exclusively to actions against employers.

sons" [38] and, hence, unions.[39] The term "employer" includes unions only when they also are employers.[40] Therefore, unions are not subject to private damage actions for EPA violations.

Where, as in the FLSA, Congress has carefully delineated the exclusive means of enforcement of statutory liabilities and the available remedies, "a court must be chary of reading others into it." *Transamerica*, 444 U.S. at 19.[41]

2. The Courts Have Uniformly Concluded That the EPA Does Not Subject Unions to Private Damage Claims for Equal Pay Act Liability.

The comprehensiveness of the EPA has led courts to unanimously reject employer contribution claims.[42] As the court below observed:

"The statutory scheme of enforcement is comprehensive and by omission, it insulates unions from suits by

---

[38] 29 U.S.C. §203(a).

[39] *Bowe* v. *Judson C. Burns*, 137 F.2d at 39.

[40] 29 U.S.C. §203(d). The legislative history of the EPA demonstrates that "[t]he definitions and interpretations of the FLSA apply. These have been court tested and are generally understood by business and labor." H.R. Rep. No. 309, Supplemental Views, 88th Cong., 1st Sess. 8, *reprinted in* (1963) U.S. Code Cong. & Ad. News 687, 690. *Accord*, 109 Cong. Rec. 9195 (1963) (Rep. Frelinghuysen).

[41] *See National Railroad Passenger Corp.* v. *National Ass'n. of Railroad Passengers*, 414 U.S. 453, 458 (1974).

[42] *Denicola* v. *G.C. Murphy Co.*, 562 F.2d 889, 894-95 (3d Cir. 1977). ("The Act evidences absolutely no Congressional intent to make a union liable either to an employee or an employer . . . . the statute has left no interstices with regard to the rights and liabilities of the various parties. . . ."); *Brennan* v. *Emerald Renovators, Inc.*, 410 F. Supp. 1057, 1063 (S.D.N.Y. 1975) ("The Fair Labor Standards Act of 1938 provides for its enforcement through both civil and criminal actions by specified parties. . . . [T]here seems no need to supplement the statute with an additional remedy which Congress did not see fit to provide"); *EEOC* v. *Ferris State College*, 23 FEP Cases at 437-38; *Usery* v. *Beloit College*, 12 E.P.D. ¶11,203 (W.D. Wisc. 1976); *Marshall* v. *Tombs Janitorial Service*, 82 L.C. ¶33,559 (W.D.Mo. 1977).

> employees. This statutory protection would certainly be frustrated by a declaration that an *employer* could recover from a union, once that employer had been found liable to its employees." 606 F.2d at 1355 (P.A., pp. 9d-10d).

Similarly, the courts have uniformly declined to recognize an implied cause of action in favor of employees against unions.[43] Because common liability to the affected employees is an indispensable element of a claim for contribution (NWA brief, p. 13), Northwest's claim for EPA contribution must fail.[44]

---

[43] *Cook* v. *Mountain States T & T Co.*, 12 FEP Cases 979, 986 (D. Ariz. 1975); *Tuma* v. *American Can Co.*, 367 F. Supp. 1178, 1181 (D.N.J. 1973); *Hunter* v. *United Air Lines*, 10 FEP Cases 787, 788 (N.D.Cal. 1975); Decision of District Court below (P.A., p. 7b).

[44] Northwest erroneously cites three lower court decisions as demonstrating that unions and employers share equal monetary responsibilities under the EPA. *Hodgson* v. *Sagner, Inc.*, 326 F. Supp. 371, 374 (D.Md. 1971), *aff'd sub nom. Hodgson* v. *Baltimore Regional Jt. Board*, 462 F.2d 180 (4th Cir. 1972), awarded the Secretary of Labor monetary relief against a union based *solely* on its outrageous conduct in insisting that an employer divert to its male employees part of the back pay which it had agreed to provide to female victims of discrimination. The courts have consistently refused to read *Sagner* as support for an employer right to contribution against unions. Decision below, 606 F.2d at 1356 (P.A., p. 11d); *Denicola* v. *G.C. Murphy*, 562 F.2d at 894; *EEOC* v. *Ferris State College*, 23 FEP Cases at 441-42; *Brennan* v. *Emerald Renovators*, 410 F. Supp. at 1062. Moreover, the Department of Labor, in spite of its recovery in *Sagner*, has consistently taken a position against recognition of a right of employer contribution. Copies of Department of Labor briefs in other litigation were annexed to ALPA's brief to the Court of Appeals below.

Sinyard v. *Foote & Davies Div. of McCall Corp.*, 577 F.2d 943 (5th Cir. 1978), does not address any issue as to monetary remedies against unions under the EPA.

Finally, *Dunlop* v. *Beloit College*, 411 F. Supp. 398 (W.D. Wisc. 1976), cuts entirely against Northwest's position. In a subsequent decision in the same litigation the court held that an employer has no right of contribution for EPA liability. *Usery* v. *Beloit College*, 12 E.P.D. at 5536.

(Footnote continued on following page)

3. The Legislative History of the EPA Demonstrates That Congress Did Not Intend to Subject Unions to Private Damage Claims for EPA Liability.

The legislative history of the EPA confirms that, contrary to Northwest's contentions, Congress did not "absentmindedly" forget to subject unions to private damage actions. *Transamerica,* 444 U.S. at 20.

The equal pay bills introduced, but not enacted, in 1961[45] and 1962,[46] provided an enforcement scheme independent of the FLSA with monetary penalties uniformly applicable to employers and unions.[47] The bill passed by Congress in 1963, H.R. 6060, 88th Cong., 1st Sess. (1963), discarded the entire enforcement scheme of the 1962 bill and incorporated the equal pay provisions into the statutory scheme of the FLSA. This change resulted in (1) the *elimination* of provisions subjecting union violators to monetary liability and (2) the addition of a private right of action in employees for back pay and liquidated damages, but against employers only.[48]

(Footnote continued from preceding page)

Contrary to Northwest's claim (NWA brief, p. 27 n.17), nothing in *EEOC* v. *Air Line Pilots Association,* 489 F. Supp. 1003 (D. Minn. 1980), suggests that unions are liable for *private* damage claims under the FLSA. The court grounded liability under Section 7 of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §626(b), which it concluded provided broader relief than that available under the FLSA.

[45] S. 2494, 87th Cong., 1st Sess. (1961).

[46] H.R. 11677, 87th Cong., 2d Sess. (1962).

[47] Section 6 of the 1962 bill expressly provided for "payment of back wages plus an additional amount . . . as may be appropriate" by all violators, including unions. 108 Cong. Rec. 14765-66 (1962).

[48] The 1962 bill provided for enforcement of the statute only through suit by the Secretary of Labor, and did not authorize any private right of action by employees. *See* H.R. 11677, 87th Cong., 2d Sess.; 108 Cong. Rec. 14765-66 (1962) [setting forth text of House bill]. Thus, contrary to Northwest's contention (NWA brief, p. 25), Congress *never* considered provisions subjecting unions to private actions for back pay.

Notwithstanding these changes, Northwest contends that "Congress, however, assumed that when the new Equal Pay Act merged into the FLSA . . . unions as well as employers would become subject equally to all the remedies that had been available to aggrieved employees under the FLSA." NWA brief, p. 26. However, the floor debates following introduction of H.R. 6060 confirm that Congress did not assume that the courts would enforce the EPA in a manner inconsistent with the express provisions of the FLSA.[49] Instead Congress clearly intended that the EPA would be enforced in precisely the same manner as the FLSA,[50] and deliberately chose to restrict the remedies for EPA violations to those provided by the FLSA.[51]

Congress was aware that the FLSA enforcement scheme treated employers and unions differently. For example,

---

[49] Congress viewed incorporation into the FLSA as a significant change from the prior bills. As Rep. Griffith stated, "[t]he proposal . . . that the legislation should be an amendment to the Fair Labor Standards Act was a very major difference. . . ." 109 Cong. Rec. 9197 (1963). The change was significant not only from the standpoint of "[a]dministrative efficiency" 109 Cong. Rec. 8916 (1963) (Sen. Randolph), but also because it would enable the application of all the definitions, judicial and administrative interpretations, and enforcement mechanisms, penalties and remedies of the FLSA, which had been "court tested and . . . generally understood by business and labor.'" 109 Cong. Rec. 9195 (1963) (Rep. Frelinghuysen).

[50] Rep. Goodell, a principal proponent of the bill as enacted, also supported this position. 109 Cong. Rec. 9198 (1963). *See also* 109 Cong. Rec. 9207 (1963) (Rep. Carey); *id.* at 9212 (Rep. Ryan); and *id.* at 9203 (Rep. Roosevelt).

[51] *See, e.g.*, 109 Cong. Rec. 9195 (1963) ("The effect of the bill is to give *employees* who would be entitled to receive equal pay treatment under it the *same remedies* which are prescribed for workers in relation to minimum wage and overtime payments required by the Fair Labor Standards Act.") (Rep. Powell) (emphasis added); *id.* at 9204 ("This bill [H.R. 6060] does not extend the coverage of the Fair Labor Standards Act *nor does it prescribe additional penalties to those that are covered in that law.*" (Rep. Pepper) (emphasis added).

Rep. Goodell, a sponsor of the 1963 EPA legislation, reviewed the remedies for employer violations:

> "The employee or the Secretary [of Labor] would have to go to court, and the court would have to decide that there has been a violation. The Labor Department may get an injunction against an *employer* to eliminate the violation. If the employee sues the *employer* under one section of the Fair Labor Standards Act he may be able to recover double the wage differential involved." 109 Cong. Rec. 9208 (1963) (emphasis added).

His description of various remedies for union misconduct significantly omitted any reference to monetary liability:

> "[I]n a situation where an employer is bound by an existing agreement as to a wage differential [and the] Labor Department and the courts say that agreement violates this act . . . this bill as now written obligates the union . . . and gives the Secretary of Labor, if necessary, the power to enjoin not only the employer but the union, to sit down and negotiate and eliminate the discrimination in violation of this act." 109 Cong. Rec. 9209 (1963).

The Congressional debates refer to private employee suits only against employers.[52]

---

[52] *See, e.g.*, 109 Cong. Rec. 9196 (1963) (Rep. Frelinghuysen); *id.* at 9215 (Rep. May). The remarks of Rep. Griffin of Michigan, who had proposed the inclusion of the union prohibition in the 1962 bill, further illustrate Congressional awareness that H.R. 6060 would not treat union violators like employers:

> "I want to focus attention on . . . an amendment which I offered [to the 1962 bill] to prohibit labor organizations from causing or attempting to cause an employer to discriminate in violation of the act. We have a provision in this bill [H.R. 6060] along those lines. *It may not be as strict as some would like,* but it does clearly prohibit labor organizations from causing or attempting to cause an employee [sic] to violate

4. Contribution Conflicts With Important EPA Policy.

As stated in the EPA's Declaration of Purpose, Congress viewed wage differentials based on sex as enabling discriminatory employers to obtain an unfair competitive advantage:

> "The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex—
>
> (1) depresses wages and living standards for employees necessary for their health and efficiency;
>
> • • •
>
> (5) constitutes an unfair method of competition." [53]

If a discriminatory employer could offset its own liability through contribution, it would, in effect, retain a portion of

---

the provisions of the act." 109 Cong. Rec. 9198 (1963) (emphasis added).

In support of its position, Northwest cites a statement of Rep. O'Hara that union violators "would be subject to all the penalties and all the enforcement provisions provided under the Fair Labor Standards Act." 109 Cong. Rec. 9209 (1963) (NWA brief, p. 26). Neither this statement, nor Rep. Thompson's (NWA brief, p. 26), suggests any intent to subject unions to liabilities other than those specifically contained in the statute. *Compare* Rep. Thompson's statement at 109 Cong. Rec. 7223 (1963) ("The prohibition against discrimination solely on the basis of sex is enforceable *to the same extent* that minimum wage and maximum hours are enforceable under fair labor standards, and *by the same people.*" (emphasis added)). Since the FLSA does not provide for union liability to private parties, no such liability exists.

[53] Equal Pay Act of 1963, Pub.L. 88-38, Sec. 2(a), 77 Stat. 56, *reprinted in* (1963) U.S. Code Cong. & Ad. News 59; *see* 29 U.S.C. §202(a)(3). These findings are also reflected in the floor debates on both the 1962 and 1963 bills. *See, e.g.*, 108 Cong. Rec. 10503 (1962) (Rep. Sullivan); *id.* at 14748 (Rep. Zelenko); *id.* at 14752-53 (Rep. Dwyer); *id.* at 14753 (Rep. May); *id.* at 14756 (Rep. Bailey); *id.* at 14757 (Rep. Daniels); *id.* at 22084 (Sen. McNamara); 109 Cong. Rec. 9203 (1963) (Rep. Daniels); *id.* at 9204 (Rep. Rivers); *id.* (Rep. Toll); *id.* at 9207 (Rep. Staggers).

the illegal wage differential and thereby secure an improper competitive advantage over non-discriminatory employers, whom Congress specifically intended to protect.[54] Thus, recognition of contribution would be entirely incompatible with congressional policy.

In sum, the express provision of the EPA, its legislative history, and the policies embodied in the Act all negate any finding that Congress intended to subject unions to claims for contribution. Accordingly, no such claim can be judicially created.

C. *The Text and Legislative History of Title VII Bar Contribution.*

1. Congress Intentionally Limited the Means by Which Title VII May Be Enforced.

Following "tempestuous legislative proceedings," Congress adopted an explicit scheme for enforcement of Title VII which "was clearly the result of compromise." *Mohasco Corp.* v. *Silver*, 100 S.Ct. 2486, 2493 (1980). "Cooperation and voluntary compliance were selected as the preferred means" for eliminating discrimination. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).[55]

---

[54] As the Court below noted, "[t]he Act's focus on unfair competition explains the existence of a greater battery of deterrents against employer-violators than against unions who participate in the breach." 606 F.2d at 1355. (P.A., p. 10d). *Accord, EEOC* v. *Ferris State College*, 23 FEP Cases at 441; *Brennan* v. *Emerald Renovators, Inc.*, 410 F. Supp. at 1061; *Usery* v. *Beloit College*, 12 E.P.D. at 5535-36. *See also Wirtz* v. *Malthor, Inc.*, 391 F.2d 1, 3 (9th Cir. 1968).

[55] This followed the approach of the many fair employment practice bills introduced in Congress between 1947 (Ives-Fulton bill, S.984, H.R. 2824, 80th Cong., 1st Sess.) and 1964, which recognized that efforts to eliminate discrimination involved sensitive issues, 93 Cong. Rec. 2688 (1947) (Sen. Ives), which could be more effectively dealt with initially by informal, voluntary procedures. H.R. Rep. No. 1370, 87th Cong., 2d Sess. 6 (1962), accompanying H.R. 10144, which in substantial part became Title VII of the omnibus Civil Rights Bill (H.R. 7152); 110 Cong. Rec. 2602 (1964) (Rep. Dent.); 110 Cong. Rec. 6549 (1964) (Sen. Humphrey).

Title VII's "integrated, multistep enforcement procedure" [56] begins with the filing of a charge of discrimination with the EEOC, or appropriate state agency,[57] "by or on behalf of a person claiming to be aggrieved, or by a member of the [EEOC]." [58] The charge notifies a charged party of the nature of alleged discrimination, and "trigger[s] the investigatory and conciliatory procedures of the EEOC." *Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970).[59] The EEOC has the responsibility of investigating the charge and, where there is reasonable cause to believe a statutory violation is present, of attempting "to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion." [60]

Federal court actions to enforce Title VII may not be commenced until 180 days following the filing of an EEOC charge, unless the EEOC has previously dismissed the charge.[61] Title VII actions may only be filed "against the respondent named in the charge," [62] and must be limited "to the 'scope' of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimi-

---

[56] *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 359 (1977).

[57] Section 706(b), (c), 42 U.S.C. §2000e-5(b), (c).

[58] Section 706(b), 42 U.S.C. §2000e-5(b).

[59] The charge thus plays a critical, substantive role in the statutory scheme. *Travers* v. *Corning Glass Works*, 76 F.R.D. 431, 433 (S.D.N.Y. 1977); *Peterson* v. *Lehigh Valley District Council*, 453 F.Supp. 735, 740 (E.D.Pa. 1978).

[60] Section 706(b), 42 U.S.C. §2000e-5(b).

[61] Section 706(f)(1), 42 U.S.C. §2000e-5(f)(1). The time period before which suit can be commenced is extended an additional sixty days when the charge has been filed in a state prohibiting the alleged unlawful discrimination. *Id.*

[62] *Id.* The filing requirement, which triggers the "opportunity" for conciliation, is an absolute jurisdictional prerequisite to the filing of a Title VII action. *See* discussion at Point II-D, *infra*.

nation." *Sanchez,* 431 F.2d at 466.[63] The "plenary" powers of the Court to remedy Title VII violations (NWA brief, p. 13), are provided by Section 706(g) of the Act, and may only be exercised against "respondents." [64]

Thus, Title VII "creates statutory rights against invidious discrimination in employment and establishes a comprehensive scheme for the vindication of those rights." *Johnson* v. *Railway Express Agency, Inc.,* 421 U.S. 454, 457-58 (1975). The legislative history confirms that Congress intended this enforcement scheme to be the exclusive means of enforcing Title VII's prohibitions:

> "The procedures set up in Title VII are the *exclusive* means of relief against those practices of discrimination which are forbidden as unlawful employment practices by sections 704 and 705 [§§703 and 704, as enacted]." 110 Cong Rec. 7207 (1964) (Justice Department Memorandum introduced by Sen. Clark).[65]

The statute sets forth "the exact procedures to be followed. . . ." 110 Cong. Rec. 7420 (1964) (Sen. Humphrey). Any effort to establish Title VII liability by other means would contravene both the text and the legislative history of the statute.

---

[63] *Accord, Tipler* v. *E.I. duPont de Nemours & Co.,* 443 F.2d 125, 131 (6th Cir. 1971).

[64] Under Section 706(g), 42 U.S.C. §2000e-5(g), remedies may be awarded only "[i]f the court finds that the *respondent* has intentionally engaged in or is intentionally engaging in an unlawful employment practice. . . ." (emphasis added). The term "respondent" is defined as the "employer, employment agency, labor organization, or joint labor-management committee" identified in an EEOC charge as having engaged in an unlawful employment practice. Section 706(b), 42 U.S.C. §2000e-5(b).

[65] While Northwest cites this same memorandum for the proposition that unions were intended to be subject to the same monetary sanctions as employers (NWA brief, p. 17 and n.10), it ignores the memorandum's emphasis on the exclusivity of means to establish union liability—the same exclusive machinery applicable to employers.

2. Congress Did Not Authorize Discriminatory Employers to Establish Union Title VII Liability.

Northwest has attempted to justify its present effort to supplement Title VII's enforcement mechanisms against unions by arguing that "[u]nion members will surely be reluctant to take on their own unions if they can avoid a direct confrontation." NWA brief, p. 35. Congress carefully considered who could establish Title VII violations, and specifically addressed the concern raised by Northwest. The "solution" *that Congress adopted* was to allow charges to be filed by the EEOC, in addition to individual employees:

> "This provision of the bill [authorizing a member of EEOC to file a complaint] is an effective one in connection with the proper operation of an equal employment opportunity commission, as we have found in the course of our experience in New York. For example, a union member may not wish to complain about his union, although a member of the Commission would feel free to do so." 110 Cong. Rec. 14191 (1964) (Sen. Javits).[66]

Significantly, when Congress amended Title VII in 1972, it expanded the class of individuals who might enforce Title VII by allowing charges to be filed "on behalf of a person claiming to be aggrieved," [67] and by granting the EEOC authority to bring Title VII actions.[68] No "cause of action" was granted to discrimintary employers to adju-

---

[66] *See* 110 Cong. Rec. 14188 (1964) (Sen. Case), emphasizing that filing of charges by the EEOC was the means selected for overcoming any "intimidation" of aggrieved individuals which might otherwise prevent the filing of charges.

[67] Section 706(b), 42 U.S.C. §2000e-5(b) (1972).

[68] Section 706(f)(1), 42 U.S.C. §2000e-5(f)(1) (1972).

dicate the Title VII liability of unions; none can be inferred.[69]

3. Title VII Liability Cannot Be Established by Extra-Statutory Means.

The Court, consistent with the text and legislative history of Title VII, has emphasized the importance of respecting the exclusivity of the scheme embodied in Title VII.[70] In *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50 (1975), the Court refused to allow claims of conduct allegedly violative of Section 704(a) of Title VII, 42 U.S.C. §2000e-3, to be presented to the National Labor Relations Board:

> "Questions arising under Title VII must be resolved by the means that Congress provided for that purpose. . . . What is said above does not call into question either the capacity or the propriety of the [NLRB's] sensitivity to questions of discrimination. It pertains, rather, to the proper allocation of a particular function—adjudication of claimed violations of Title VII—that Congress has assigned elsewhere." *Id.* at 71-72 n. 25.

Northwest's reliance upon *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), and other decisions in which unions have been held jointly liable along with employers under Title VII,[71] and its references to statements in the legislative history reflecting an intention to reach union dis-

---

[69] *Cf. Piper*, 430 U.S. at 37 ("a party whose previously unregulated conduct was purposefully brought under federal control by the statute . . . can scarcely lay claim to the status of 'beneficiary' whom Congress considered in need of protection."); *see Lank* v. *New York Stock Exchange*, 548 F.2d 61, 65-66 (2d Cir. 1977).

[70] *See, e.g., United Air Lines* v. *Evans*, 431 U.S. 553 (1977); *Mohasco, supra*, 100 S.Ct. 2486.

[71] *See* cases cited at p. 20 n.16 of Northwest's brief.

crimination,[72] are therefore misplaced. The issue is not whether union conduct is covered by Title VII, but how that coverage is to be implemented. The unions herein have been deprived of any opportunity to conciliate the underlying claims of discrimination. Thus, recognition of Northwest's claim would directly contravene the explicit scheme "that Congress provided for that purpose," *Emporium Capwell,* 420 U.S. at 71-72 n.25, depriving the unions of the explicit statutory requirement that all respondents be provided an opportunity for conciliation before suit. It would require the court "to override a host of consciously made decisions well within the exclusive competence of the Legislature." *Id.* at 73. Nothing in *Albemarle* supports such a result.[73]

---

[72] *See* Northwest's brief, pp. 17-19, and n.11-15. The focus of the legislative references cited by Northwest was on situations in which unions discriminated by excluding minorities from membership, or by foreclosing employment opportunities through control of a hiring hall, and not on collective bargaining activities.

[73] Both the employer and the local union in *Albemarle* had been named in EEOC charges, and were found to have violated Title VII in a suit brought by aggrieved persons; all claims against the international union were dismissed because it had never been named in an EEOC charge. 271 F.Supp. 27, 29 (E.D.N.C. 1967). Similarly, in the other joint-liability cases cited by Northwest (NWA brief, p. 20 n.16 and Court of Appeals decisions at p. 39 n.28), both the employers and the unions had been charged before the EEOC in advance of suit. *See also EEOC* v. *Air Line Pilots Association, supra,* 489 F.Supp. 1003.

The district court "contribution" decisions cited by Northwest (NWA brief, p. 39 n.28), do not establish any right to contribution. Indeed, *Communications Workers* v. *Illinois Bell Telephone Co.,* 12 E.P.D. ¶11,275 (N.D.Ill. 1976), holds that there is no common law right to Title VII contribution, a conclusion also reached by two decisions Northwest fails to cite. *Younger* v. *Glamorgan Pipe & Foundry Co.,* 418 F. Supp. 743 (W.D.Va. 1976), *vacated on other grounds,* 561 F.2d 563 (4th Cir. 1977), and *Harden* v. *Illinois Bell Telephone Co.,* 74 C 1505 (N.D.Ill. April 8, 1975) (unreported decision, previously annexed to Court of Appeals brief).

The Fifth Circuit, in its recent decision in *Wilson P. Abraham Construction* v. *Texas Industries, supra,* 604 F.2d 897, denying

The Court has denied any remedy where the scheme of Title VII has not been strictly followed even where the aggrieved individual has been subjected to discriminatory treatment. *United Air Lines, Inc. v. Evans, supra,* 431 U.S. 553; *Mohasco, supra,* 100 S.Ct. 2486. While the denial of relief in such situations neither deters future Title VII wrongdoing nor "spur[s] . . . employers and unions to self-examine and to self-evaluate their employment practices," *Albemarle Paper,* 422 U.S. at 417-18, it nevertheless is the result which Title VII requires.

Title VII's explicit enforcement scheme is incompatible with judicial creation of extra-statutory rights and remedies for the benefit of Title VII wrongdoers. A supplemental enforcement procedure, like contribution, cannot be fashioned simply because one violator believes the scheme Congress has chosen is unfair or ineffective:

> "We must respect the compromise embodied in the words chosen by Congress. It is not our place simply to alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction." *Mohasco,* 100 S.Ct. at 2497.[74]

Northwest's claim simply cannot be squared with the exclusive statutory scheme, and accordingly must be dismissed.[75]

---

contribution for antitrust liabilities, refused to accord any weight to the district court Title VII "contribution" cases:

> "The cases decided under the Civil Rights Act do not even discuss the rationales for allowing contribution. We decline to discard an established rule of law by relying on cases that offer no reasons." 604 F.2d at 903.

[74] The majority decision in *Glus II, supra,* 23 FEP Cases 86, while correctly turning to Title VII to determine whether a right to Title VII contribution could be recognized, inexplicably failed to consider the exclusive statutory scheme for establishing such liability.

[75] Even under Northwest's open-ended view of the remedial powers of the Court, a right of contribution cannot be recognized

D. *The District Court Lacks Jurisdiction Over Northwest's Claim for Contribution for Its Title VII Liability Against Defendants That Have Not Been Charged With Discrimination Before the EEOC.*

Northwest seeks a judgment that the unions violated Title VII and are liable for back pay to remedy such violations.[76] Because the unions were never charged with discrimination before the EEOC, the court lacks jurisdiction to entertain this claim.

1. The Filing of an EEOC Charge Is an Absolute Jurisdictional Requirement.

This Court has consistently held that jurisdiction over claims of Title VII violations only exists where suit has been preceded by (1) the filing of a timely charge of discrimination *and* (2) timely filing of suit after receipt of a notice of right to sue from the EEOC.[77] Thus, where Title VII claims are asserted against an employer and a union, but only the employer has been charged, all Title VII claims against the union must be dismissed.[78] These re-

---

unless it "is consistent with the federal law creating the underlying liability." NWA brief, p. 13.

[76] J.A. 19-20 (¶11), 21 (¶14).

[77] *Alexander* v. *Gardner-Denver Co.*, 415 U.S. at 47 (the statute "specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit"); *United Air Lines* v. *Evans*, 431 U.S. at 555 n.4; *Int'l Union of Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 239-40 (1976); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973).

While some lower courts have construed the time limits for filing EEOC charges to be statutes of limitations rather than jurisdictional requirements, *compare, e.g., Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975) *with Verzosa* v. *Merrill Lynch, Pierce, Fenner & Smith*, 589 F.2d 974 (9th Cir. 1978), no court has held that the requirement *per se* that a charge be filed prior to suit is anything less than absolute and jurisdictional.

[78] *See, e.g., Miller* v. *International Paper Co.*, 408 F.2d 283, 285 (5th Cir. 1969); *Sabala* v. *Western Gillette, Inc.*, 516 F.2d 1251,

sults are mandated by Congress' decision to require initial reference of all claims to the EEOC.[79]

2. Title VII's Jurisdictional Prerequisites Bar Northwest's Contribution Claim.

Northwest seeks to avoid the jurisdictional requirements of Title VII by "asserting a federal common law right of contribution, not a discrimination claim under Title VII itself" (NWA brief, p. 51), and basing jurisdiction on 28 U.S.C. § 1331.[80] However, the "federal common

---

1254 (5th Cir. 1975), *vacated on other grounds,* 431 U.S. 951 (1977); *Williams* v. *General Foods Corp.,* 492 F.2d 399, 405 (7th Cir. 1974); *Crawford* v. *Western Electric Co.,* 614 F.2d 1300 (5th Cir. 1980); *Cutliff* v. *Greyhound Lines, Inc.,* 558 F.2d 803 (5th Cir. 1977); *Wiggins* v. *Spector Freight Systems, Inc.,* 583 F.2d 882, 884 (6th Cir. 1978).

The same result is reached under the National Labor Relations Act ("NLRA"), which as Northwest recognizes (NWA brief, p. 17) served as the model for the remedial scheme of Title VII. Under the NLRA, the party charged before the NLRB, whether employer or union, is liable for *all* of the injuries resulting from an unfair labor practice, even where the unlawful conduct flows from the provisions of a collective bargaining agreement. *Compare Radio Officers Union* v. *NLRB,* 347 U.S. 17, 34-35, 47 (1954) [*Gaynor News* v. *NLRB*] *and NLRB* v. *Vernitron Electrical Components, Inc.,* 548 F.2d 24, 27 (1st Cir. 1977) (only employer liable) *with NLRB* v. *Local 776, IATSE (Film Editors),* 303 F.2d 513, 516 n.2 (9th Cir.) *cert. denied,* 371 U.S. 826 (1962) (only union liable). Liability can only be apportioned among jointly-charged parties. *NLRB* v. *Puerto Rico S.S. Ass'n,* 211 F.2d 274, 276-77 (1st Cir. 1954). All of the Title VII "apportionment cases" cited by Northwest (NWA brief, p. 41 and n.30) similarly involve jointly-charged parties.

[79] *Accord, Beverly* v. *Lone Star Lead Construction Corp.,* 437 F.2d 1136, 1139 (5th Cir. 1971) (all respondents must be afforded "at least an *opportunity* to reach a more amicable conciliation out of court. . . . The purpose of the Act would indeed be frustrated if the Commission could be avoided entirely. . . .") ; *Stebbins* v. *Continental Insurance Cos.,* 442 F.2d 843, 845-46 (D.C.Cir. 1971).

[80] Northwest also asserts that the district court below held that jurisdiction lies in this case on the basis of diversity. NWA brief, p. 52 n.37. The District Court subsequently corrected its error, deleting its earlier footnote on diversity jurisdiction (J.A. 46).

law" only serves as a "law of the United States" [81] within the scope of 28 U.S.C. § 1331 in the limited instances where the right asserted is based on duties derived from the common law itself. *See, e.g., Illinois* v. *Milwaukee,* 406 U.S. at 103. Where, as here, a claim invokes statutory obligations, the claim "arises," for jurisdictional purposes, under that statute, not the "federal common law." [82]

Any limitations upon jurisdiction which are found in the statute under which the claim arises bar resort to general jurisdictional grants, such as those embodied in 28 U.S.C. §§ 1331 and 1337.[83] Such statutory jurisdictional limitations cannot be avoided through artful pleading of alternative sources of substantive rights, if the substance of the claim involves the enforcement of duties created by the statute. *Weinberger* v. *Salfi,* 422 U.S. 749 (1975). *Accord,*

---

[81] The pertinent part of 28 U.S.C. § 1331 reads:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution, laws, or treaties of the United States. . . ."

[82] *See Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen, Ocean Lodge No. 76,* 323 U.S. 210, 213 (1944) (claim asserting breach of union's "federal common law" duty of fair representation is derived from and "arises under" the Railway Labor Act for jurisdictional purposes); *Avco Corp.* v. *Aero Lodge No. 735, IAM,* 390 U.S. 557, 561-62 (1968) (claim requiring courts to fashion "common law" to enforce agreements under Section 301 of the LMRA, 29 U.S.C. § 185, arises under that "Act of Congress" for purposes of 28 U.S.C. §1337, not the common law).

Northwest's reliance on *Johnson* v. *Railway Express Agency, Inc., supra,* 421 U.S. 454 (NWA brief, p. 51), is misplaced. The claim there asserted a violation of 42 U.S.C. §1981; therefore Title VII's jurisdictional prerequisites were inapplicable. By contrast, Northwest's claim lacks an independent statutory source of rights.

[83] *See, e.g., General Committee of Adjustment of Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas R.R. Co.,* 320 U.S. 323 (1943), where the Court declined to apply general federal question jurisdiction "in enforcement of an obligation which it is claimed Congress has created," *id.* at 333, because Congress had left the dispute to voluntary resolution by conciliation, mediation and arbitration. *See also Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297, 300-01 (1943).

Glus v. *G.C. Murphy Co.*, 562 F.2d 880 (3d Cir. 1977) ("Glus I").[84]

In *Weinberger* v. *Salfi*, the Court held that claimants seeking benefits under the Social Security Act could not avoid that Act's jurisdictional limitations by invoking jurisdiction under 28 U.S.C. § 1331 through characterization of their claim as a deprivation of constitutional rights. Similarly, Northwest cannot invoke § 1331 jurisdiction in an action to establish another party's Title VII liability. The EEOC charge is "[t]he key to the courthouse door." *Jenkins* v. *United Gas Corp.*, 400 F.2d 28, 30 (5th Cir. 1968). To allow Northwest to proceed in the absence of any charge against the unions "'would be to judicially admit at the back door that which has been legislatively turned away at the front door.'" *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673 (1977), *quoting Laird* v. *Nelms*, 406 U.S. 797, 802 (1972).

Just as Congress has provided a right of contribution in some statutes, but not others,[85] it has also eliminated statutory jurisdictional limitations for third party claims where it considered doing so appropriate.[86] Contrary to Northwest's suggestion (NWA brief, p. 52), courts cannot

---

[84] In *Glus I*, the Court held that Title VII's jurisdictional prerequisites apply to employer contribution claims. In *Glus II*, the Court considered, but did not decide, whether 28 U.S.C. §1331 could serve as a separate basis of subject matter jurisdiction. 23 FEP Cases at 88 n.1.

None of the other Title VII "contribution cases" cited by Northwest (NWA brief, p. 39 n.28) rested jurisdiction on 28 U.S.C. §1331.

[85] *See* discussion at II-A, *supra*.

[86] The Federal Tort Claims Act bars actions based on tort claims against the United States that have not previously been submitted to the appropriate Federal agency. 28 U.S.C. §2675(a). This prerequisite is jurisdictional. *E.g.*, *Employees Welfare Committee* v. *Daws*, 599 F.2d 1375 (5th Cir. 1979). However, the statute expressly eliminates the requirement for contribution actions: "The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim." 28 U.S.C. §2675(a).

create exceptions to meet the exigencies of a particular case.[87] The absence of a charge against the unions is an absolute bar to Northwest's claim for contribution for Title VII liability.[88]

E. *Policy Considerations Do Not Support Contribution for Title VII or EPA Liability.*

Contrary to Northwest's suggestions, a right to contribution for its Title VII and Equal Pay Act liability cannot be judicially established simply as a matter of "fairness" or policy. The courts "are not at liberty to legislate." *Touche*

---

[87] Unlike "procedural defenses" or statutes of limitations, which may be waived by the conduct or consent of the parties, a jurisdictional limitation cannot be modified for reasons of "fairness" or judicial policy. *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6, 17-18 (1951). Thus, Northwest's lack of standing to file an EEOC charge (NWA brief, p. 51) does not allow avoidance of the jurisdictional requirements. *See also Snyder* v. *Harris*, 394 U.S. 332, 341-42 (1969) ("If there is a present need to expand the jurisdiction of [federal] courts we cannot overlook the fact that the Constitution specifically vests that power in the Congress, not in the courts.").

[88] The exclusive nature of Title VII's remedial scheme precludes the determination of ALPA's asserted Title VII liability, even if it were determined that jurisdiction existed under §1331. *See Southbridge Plastics Div., W. R. Grace & Co.* v. *Local 759, Int'l Union of Rubber Workers*, 565 F.2d 913 (5th Cir. 1978) (issues of Title VII liability cannot be determined in the absence of an EEOC charge against the union in an action under §301 of the LMRA). *Cf. Yakus* v. *United States*, 321 U.S. 414, 434-35, 444-46 (1944) (jurisdiction over criminal prosecution for violation of maximum price regulation, but not over defense that regulation was invalid); *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 775 (1952) (jurisdiction over duty of fair representation claims, but not over questions involving craft or class determinations).

Any substantive defense which the party from whom contribution is sought would have against the original plaintiff can similarly be asserted against the contribution plaintiff. Restatement (Second) Torts §886A, Comment (g) (1979); W. Prosser, The Law of Torts, §50, ¶5, p. 309 (4th ed. 1971). Since the absence of a charge against the unions would bar any effort by the *Laffey* plaintiffs to establish their Title VII liability, it similarly bars any effort to establish this Title VII liability through contribution.

Ross, 442 U.S. at 579. Congress alone "has the power and judgment to pick and choose among its statutes" [89] to determine where contribution would or would not be appropriate.[90]

Each of Northwest's policy arguments are subject to substantial countervailing considerations. The validity of the underlying assumptions and the potential impact of contribution upon diverse interests can only be determined by "the kind of investigation, examination, and study that legislative bodies can provide and courts cannot." *Diamond* v. *Chakrabarty*, 100 S.Ct. 2204, 2212 (1980).[91] Where, as here, "the claim now asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position" and "presents questions of policy upon which Congress had not spoken," it cannot be judicially created. *United States* v. *Gilman*, 347 U.S. 507, 511 (1954).

1. A Right of Contribution Will Not Deter Violations of Title VII and the EPA.

Northwest principally relies on the deterrent value of contribution, asserted to provide a "spur or catalyst" to unions to eliminate employment discrimination. NWA brief, p. 34. Some courts have agreed.[92] Others have concluded that the unavailability of contribution serves as a stronger deterrent, since a party risks full liability if it violates the law.[93]

---

[89] *Alyeska Pipeline Service*, 421 U.S. at 263.

[90] *See, e.g., Mohasco*, 100 S.Ct. at 2497.

[91] *See TVA* v. *Hill*, 437 U.S. 153, 194-95 (1978).

[92] *Glus II*, 23 FEP Cases at 91-92; *but see* Sloviter, J., dissent, 23 FEP Cases at 100-01; Professional Beauty Supply, 594 F.2d at 1185; *but see* Hanson, J., dissent, 594 F.2d at 1189.

[93] *Brennan* v. *Emerald Renovators, Inc.*, 410 F. Supp. at 1061; *EEOC* v. *Ferris State College*, 23 FEP Cases at 441; *Carriers Insurance Exchange* v. *Truck Insurance Exchange*, 310 F.2d at 658; *Sabre Shipping Corp.* v. *American President Lines*, 298 F. Supp. at 1346; *Mataya* v. *Behm Motors*, 409 F. Supp. at 70. *Cf. Radio*

In any event, the alleged deterrent effect of contribution does not provide a basis for judicial recognition of contribution, for as the Court recently concluded in *Piper*, 430 U.S. at 39-40: "The deterrent value, if any, of such [damages] awards can never be ascertained with precision."

2. Recognition of a Right of Contribution Would Discourage Enforcement of Title VII and the EPA by Aggrieved Employees.

Title VII and the EPA authorize and encourage aggrieved individuals to act as "private attorneys general" to correct violations of those acts. *See Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 418 (1978). The statutes, as written, grant aggrieved employees prosecutorial discretion in choosing whom to sue.[94] Contribution would override that discretion and discourage enforcement.

Because unions are non-profit associations funded by member dues, contribution "would only serve to penalize the employees themselves, whose dues comprise the funds out of which the contribution payments would be made." *EEOC* v. *Ferris State College*, 23 FEP Cases at 441. Consequently, if contribution is permitted, the aggrieved employees will be made less than whole for the harm they have suffered, in derogation of the principles underlying Title VII and the EPA. *See Albemarle Paper*, 422 U.S. 418-19. Such a result "is hardly conducive to enforcement of the Act." *Brennan* v. *Emerald Renovators*, 410 F. Supp. at 1061.

Officers v. *NLRB*, 347 U.S. at 54 (to hold the party named in an administrative charge fully liable, and allow the uncharged party to escape liability entirely, does not "frustrate the [National Labor Relations] Act's purposes."

[94] This approach is patterned after the National Labor Relations Act, where "the choice of respondent or respondents lies with the person aggrieved and an employee who is illegally discriminated against by joint action of the union and the employer, may name as respondent, either the union or the employer or both." *NLRB* v. *Local 57, Int'l Union of Operating Engineers*, 201 F.2d 771, 774 (1st Cir. 1953).

These adverse consequences of contribution exist regardless of the size or wealth of the union. NWA brief, p. 44.[95] Where the amounts are of the magnitude at issue here, conservatively asserted by Northwest to total $37,000,000 (NWA brief, p. 6), the impact will be devastating, no matter how "wealthy" the union. It is one thing for aggrieved employees to weigh the consequences of substantial back pay awards upon their union, and nonetheless to elect to assert claims against it, but quite another to allow their discriminatory employers to force them to accept these consequences as the price for pursuing their rights under Title VII and the EPA.[96]

Northwest's speculative assertions as to possible employee-union "collusion" (NWA brief, pp. 35-36) do not justify overruling the employee's choice of respondent.[97] Title VII remedies are equitable. If the plaintiff's collusive activities constituted "unclean hands," the court could consider such conduct in its fashioning of relief.[98] Alternatively, a charged employer could bring employee-union

---

[95] Northwest's reference to union "receipts" (NWA brief, p. 44 n.31) is misleading because the most substantial portion of these "receipts" is derived from the investment and reinvestment of the same basic fund during the year.

[96] The Court recently counselled in *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 48 (1979), against imposing damages which "could impair the financial stability of unions and unsettle the careful balance of individual and collective interests which this Court has previously articulated in the unfair representation area."

[97] A concern with possible "collusion" does not apply in this case. Northwest does not allege any conduct which would even remotely suggest "collusion" between the *Laffey* plaintiffs and the unions. Moreover, despite the fact that the unions were not present in *Laffey* to defend against any charges made by Northwest, the findings of the District Court contain no indication of "collusion" in plaintiffs' decision not to seek back pay from the unions.

[98] For example, if a plaintiff has engaged in laches in pursuit of a Title VII claim, that can affect entitlement to relief. *See, e.g., Albemarle Paper*, 422 U.S. at 424.

"collusion" to the attention of the EEOC and request it to file its own charge against the uncharged union.[99]

3. Contribution Would Discourage Affirmative Action by Unions.

3. Title VII and the EPA encourage affirmative action by unions to remedy employer discrimination.[100] An important means of affirmative action is the commencement of Title VII actions by unions on behalf of the employees they represent.[101] Such union affirmative conduct will be deterred by employer contribution claims. Whether or not these claims are successful, their defense will undoubtedly be costly and will divert at least a portion of the union's limited resources from the pursuit of affirmative goals, to the detriment of the statutes' "intended beneficiaries."

4. Contribution Would Discourage Settlement of Title VII and EPA Cases.

As discussed above, Congress selected conciliation and settlement, rather than litigation, as the preferred means for enforcing the requirements of the fair employment statutes. *Alexander* v. *Gardner-Denver*, 415 U.S. at 44. The incentive for settlement is lessened, if not entirely removed, if a party knows that even if it agrees to settle a claim of discrimination, it faces a possible future claim for contribution by a party subsequently held liable to the aggrieved person.[102]

---

[99] As discussed above at p. 28, *supra*, Congress expressly chose this "solution" for the "collusion" problem.

[100] *See* "Resolution to Encourage Voluntary Affirmative Action," issued by the EEOC, April 1, 1980, 48 U.S.L.W. 2660.

[101] ALPA has pursued this avenue of affirmative action on many occasions. *See, e.g.*, *ALPA* v. *United Air Lines, Inc.*, 480 F. Supp. 1107 (E.D.N.Y. 1979); *ALPA* v. *Ozark Air Lines*, 10 FEP Cases 463 (N.D.Ill. 1975); *ALPA* v. *Continental Air Lines*, 10 FEP Cases 462 (N.D.Ill. 1974).

[102] *See Sabre Shipping*, 298 F. Supp. at 1346; *cf. Rogers* v. *Exxon Research & Engineering*, 550 F.2d at 841 (compensatory damages

5. Title VII's Guarantees of Fair Treatment to All Respondents Would Be Undermined by Recognition of a Contribution Claim in This Action.

As part of the "compromise" which produced Title VII,[103] Congress adopted certain provisions to assure fair treatment to potential respondents, employers and unions alike. Foremost was its decision to provide every party accused of Title VII wrongdoing the opportunity to conciliate before being sued. This approach reflects a "concern expressed in Congress that due process safeguards be built into the statutory scheme of Title VII" and manifests "a concern for the fair treatment" of respondents. *EEOC* v. *Bailey Co., Inc.*, 563 F.2d 439, 450 (6th Cir. 1977), *cert. denied*, 435 U.S. 915 (1978).

A contribution claim, as presented in this action, would strip the unions of these statutory protections. They would be denied any opportunity to conciliate the underlying discrimination claim.[104] Moreover, the unions would have to defend as to matters already adjudicated, without the benefit of discovery, cross-examination of witnesses, or an opportunity to challenge the evidence in the underlying Title VII action. These consequences would also be experienced by any union or employer that had been sued in a Title VII action and been subsequently dismissed as a party. The prejudice inherent in these results is clear and irreparable.

---

would discourage conciliation under the Age Discrimination in Employment Act).

[103] *Mohasco*, 100 S.Ct. at 2493.

[104] Northwest was named in an EEOC charge before *Laffey* was instituted, and thus was afforded the "opportunity" for conciliation. That actual conciliation efforts did not occur is beside the point. The statute requires that any respondent be afforded the opportunity to conciliate before it is sued. The charge provides that opportunity. Mandatory initial referral of a claim to the EEOC to trigger "[t]he conciliation process is one of the unique and key features which helps make Title VII fair to both plaintiffs and defendants." *Wallace* v. *Int'l Paper Co.*, 426 F. Supp. 352, 357 (W.D. La. 1977).

6. Contribution Would Conflict With Title VII's Requirement That Claims of Title VII Violations Be Promptly Asserted.

The Court of Appeals, in declining to address the merits of the Title VII contribution claim, emphasized the importance in the statutory scheme of prompt submission of claims of discrimination, and remanded to the District Court for a determination as to whether Northwest's claim was barred by laches. (P.A., pp. 12d-13d). The statute's requirement of prompt processing of all discrimination claims is a further protection Congress provided to assure fair treatment to all potential respondents. It reflects a "judgment . . . that the costs associated with processing and defending stale or dormant claims outweigh the federal interest in guaranteeing a remedy to every victim of discrimination." *Mohasco,* 100 S.Ct. at 2494.[105]

Contribution would directly override that congressional judgment, especially where the filing of a contribution claim provides the first notice to the contribution defendant of any asserted Title VII violations on its part. The substantial prejudice to the contribution defendant is graphically reflected by the undisputed facts in *Laffey* and the instant suit which reveal a conscious litigation strategy by

---

[105] *See also Int'l Union of Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. at 240 and n.14. "Congress did express concern for the need of time limitations in the fair operation of the Act. . . ." *Occidental Life Ins. Co.* v. *EEOC,* 432 U.S. at 371. In recognition of this congressional concern, the laches of an aggrieved person in pursuing a claim of discrimination may bar or affect the relief it seeks. *See, e.g., Albemarle Paper Co.*, 422 U.S. at 424. Similar considerations should apply to laches in assertion of contribution claims. *Cf. Avondale Shipyard, Inc.* v. *Vessel Thomas E. Cuffe,* 434 F. Supp. 920, 934-35 (E.D. La. 1977) (court dismissed a contribution claim for laches where a party's unreasonable delay caused prejudice to the contribution defendant, even though the underlying liability as to which contribution had been sought had not yet been determined). *Accord, Hartford Fire Ins. Co.* v. *Callanan Marine Corp.*, 398 F. Supp. 436 (S.D.N.Y. 1973). *See also Long Island Railroad* v. *New York Central No. 25,* 182 F. Supp. 100, 105 (S.D.N.Y. 1960).

Northwest to delay the assertion of any Title VII claim against the unions until such time as they have been prejudiced in their defense to such allegations.[106]

Laffey was commenced in 1970. Northwest made no attempt to join either TWU or ALPA as defendants. Even after ALPA was joined in mid-1972, at the instance of *plaintiffs* for specific, limited purposes,[107] Northwest continued its strategy of silence. If Northwest had asserted its contribution claim at the outset,[108] the unions would have been in a position to proceed as full participants in pretrial discovery and trial,[109] well in advance of any determination of the underlying *Laffey* liabilities. Instead, Northwest waited "almost four years after the action was commenced, more than three years after NWA had answered the complaint . . . and . . . several months after the court rendered its findings and judgment," 567 F.2d at 477, to amend its answer to assert a cross-claim for contribution or indemnity against ALPA. *Id.* at 476.

---

[106] At oral argument before the Court of Appeals below, Northwest counsel acknowledged that this prolonged delay in proceeding against the unions was a matter of conscious litigation strategy. (Copies of relevant pages from the transcript are set forth in Supplemental Appendix B, annexed hereto.) *See Organizations United for Ecology* v. *Bell*, 446 F. Supp. 535, 547 (M.D.Pa. 1978).

[107] The *Laffey* plaintiffs "moved to join ALPA as a party 'solely for the limited purpose of assuring that the court will have before it all the parties necessary to effectuate relief,' noting explicitly that they 'do not contend that ALPA has in any respect violated' the law. Since they deemed ALPA 'not responsible for any of the discrimination' alleged, they did not seek to join ALPA as a defendant." 567 F.2d at 477-78.

[108] ALPA maintains that any such claim would have been subject to dismissal for the same reasons presented herein.

[109] Indeed, the Court could have stayed the action 60 days to provide an opportunity for conciliation before the EEOC of any claims against the unions. Section 706(f)(1), 42 U.S.C. §2000e-5(f)(1). While this would not have provided the opportunity for conciliation *before suit* which the statute requires, it at least, as a practical matter, would have made conciliation possible before formal proceedings could have been further pursued.

The prejudice from this delay appears on the face of the complaint: Northwest seeks to apply the *Laffey* findings as the predicate for the "common liability" element of its contribution claim.[110] Although these findings cannot bind parties not in privity with the *Laffey* parties, the burden on ALPA to demonstrate that no violation of Title VII occurred, given the *Laffey* determination, is, to say the least, considerable. These consequences demonstrate the incompatibility of contribution with congressional concern for prompt processing of claims of discrimination.

F. *Contribution for Title VII and EPA Liability Cannot Be Predicated on Any Other Sources of Liability.*

Northwest, apparently recognizing that it cannot overcome the considerable hurdles to contribution under Title VII or the EPA, now asserts that an alternative basis for contribution exists based upon an alleged breach by the unions of their Railway Labor Act duty of fair representation to the *Laffey* plaintiffs. Such a claim was neither pleaded in the complaint, nor raised below, and accordingly, is not properly presented to this Court. Furthermore, the attempt to assert an additional basis for Northwest's contribution claim does not cure its deficiencies.

Northwest seeks to have the unions contribute to its liability in *Laffey* which arose under only two sources—Title VII and the EPA.[111] It would entirely subvert Congressional intent to allow Northwest to bypass the bars to contribution in those statutes by invoking another source of possible liability.[112] It would also encourage widespread

---

[110] J.A. 18-21 (¶¶7, 11, 13, 15-16).

[111] J.A. 18 (¶17), 19-20 (¶¶11, 13).

[112] *Cf. Transamerica*, 444 U.S. at 24 n.14 (a party cannot seize on an alternative theory to secure relief which Congress did not confer). Where contribution has specifically been provided in the Securities Acts, a party cannot bypass the statutory limitation of

efforts by litigants to avoid statutory restrictions on claims by simply couching their claims as "common law" rights. Northwest has cited no contribution case, state or federal, which has permitted contribution to a party whose liability arose under a statute which compels that contribution be rejected.

Any right of contribution for liabilities under the Railway Labor Act would have to be determined under that statute. The substantive standards imposed for breach of the duty of fair representation are distinct from those imposed by the EPA and Title VII;[113] the respective liabilities are not "common."[114]

---

contribution available only against fraudulent wrongdoers, by resorting to alternative theories of liability. *deHaas* v. *Empire Petroleum Company*, 286 F. Supp. 809, 816 n.10 (D.Colo. 1968), *aff'd in part and vacated in part*, 435 F.2d 1223 (10th Cir. 1970). It would be totally anomalous to allow a broader judicial right of contribution for statutory liabilities where Congress has not provided for contribution than in the limited instances where Congress has so provided.

[113] A union is accorded a "wide range of reasonableness" in its negotiation of collective bargaining agreements, *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953), and does not breach its duty of fair representation in drawing distinctions among members if it acts with "good faith and honesty of purpose." *Id. See also Humphrey* v. *Moore*, 375 U.S. 335, 349-50 (1964). In contrast, a defendant's "good faith" may not insulate it against claims of Title VII or EPA wrongdoing. *See, e.g., Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971); *Laffey*, 567 F.2d at 455. Accordingly, as one of the cases upon which Northwest purports to rely points out, *Stevenson* v. *International Paper Co.*, 432 F. Supp. 390, 408 (W.D.La. 1977), a union's conduct may violate Title VII, but not breach the duty of fair representation. *See, e.g., Peters* v. *Missouri Pacific R. Co.*, 483 F.2d 490, 496-97 (5th Cir.), *cert. denied*, 414 U.S. 1002 (1973); *Taylor* v. *Armco Steel Corp.*, 373 F. Supp. 885, 890 (S.D.Tex. 1973); *Norman* v. *Missouri Pacific R.R. Co.*, 414 F.2d 73 (8th Cir. 1973); *Tipler* v. *E.I. duPont deNemours & Co., supra*, 443 F.2d 73. *Chrapliwy* v. *Uniroyal, Inc.*, 458 F. Supp. 252 (N.D.Ind. 1977), erroneously fails to recognize these distinctions.

The findings in *Laffey*, while developed without the unions as litigants, nevertheless acknowledge the reasonableness of union conduct. 567 F.2d at 447.

[114] The cases which Northwest cites do not support its assertion that "contribution has been permitted" where an employer's liabil-

While any determination of a right to contribution under the Railway Labor Act must await a case in which that statute's obligation are at issue, there are clear indications that such a claim would be rejected. Courts construing the Railway Labor Act have found that the absence of any provision in the statute for damages for employers, even where they are directly harmed by a breach of statutory obligations, requires the rejection of an implied damage remedy in favor of employers.[115] It is far less likely that a right to employer damages would be recognized where the statutory harm, if any, is to employees, and not employers. In addition, it cannot be argued that contribution is "necessary" to effectuate the duty of fair representation, where, as here, the compensatory purposes of the duty[116] have been satisfied by provision of full relief to the aggrieved employees.

---

ity was under the EPA or Title VII and the union's was under the duty of fair representation. NWA brief, p. 34 n.25.

No contribution claim was presented in *Farmer* v. *United Catering Workers Local 1064*, 19 E.P.D. ¶9075 (E.D.Mich. 1979). *Communication Workers* v. *Illinois Bell Telephone Co., supra*, 12 E.P.D. ¶11,275, only declined to dismiss an employer's counterclaim to the union's affirmative Title VII action, and *Stevenson* v. *Int'l Paper Co., supra*, as indicated, noted the difference between the standards of proof involved for fair representation and Title VII claims. In addition, the substantive unreported decision of the District Court in *Glus* v. *G. C. Murphy Co.* (April 29, 1976) (an earlier decision of which is cited at NWA brief, p. 32 n.23), held that "common liability" did not exist over fair representation and Title VII claims.

[115] *Louisville & Nashville R.R.* v. *Brown*, 252 F.2d 149, 155 (5th Cir.), *cert. denied*, 356 U.S. 949 (1958); *National Airlines, Inc.* v. *Air Line Pilots Association, Int'l*, 431 F. Supp. 53, 54 (S.D.Fla. 1976).

[116] *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. at 48-49.

CONCLUSION

For the above reasons, that part of the judgment of the Court of Appeals pertaining to contribution for Equal Pay Act liability should be affirmed; that part of the judgment pertaining to contribution for Title VII liability should be vacated, and remanded with directions to dismiss. Alternatively, the judgment of the Court of Appeals should be affirmed in its entirety.

Respectfully submitted,

STEPHEN B. MOLDOF
Attorney for Respondent
Air Line Pilots Association,
International

Of Counsel:

KEITH E. SECULAR
JAY P. LEVY-WARREN
COHEN, WEISS and SIMON

SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX A

Pertinent Statutory Provisions

Fair Labor Standards Act:

29 U.S.C. § 203 Definitions

As used in this chapter—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

* * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

Title VII, Civil Rights Act of 1964, as amended:

Section 706, 42 U.S.C. § 2000e-5

* * *

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the 'respondent') within ten days and shall make an investigation thereof. Charges shall be in writing

under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from

such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

* * *

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred. . . .

(f) (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The

person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. . . . Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

SUPPLEMENTAL APPENDIX B

Excerpts From Transcript of Oral Argument Before Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE

DISTRICT OF COLUMBIA CIRCUIT

No. 78-1056
No. 78-1098
No. 78-1141

NORTHWEST AIRLINES, INC.,

Appellee and Cross-Appellant,

v.

TRANSPORT WORKERS UNION OF AMERICA and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Appellants and Cross-Appellees.

Washington, D.C.,
Wednesday, January 24, 1979.

The above-entitled matters came on for oral argument at 9:30 o'clock a.m.

BEFORE:

CHIEF JUDGE WRIGHT, CIRCUIT JUDGE ROBINSON, and DISTRICT JUDGE CHARLES RICHEY.

Supplemental Appendix B

APPEARANCES:

STEPHEN B. MOLDOF, ESQ., Cohen, Weiss and Simon, 605 Third Avenue, New York, New York 10016; on behalf of the Appellant/Cross-Appellee, Air Line Pilots Association.

ASHER SCHWARTZ, ESQ., O'Donnell & Schwartz, 285 Madison Avenue, New York, New York 10017; on behalf of Appellant/Cross-Appellee, Transport Workers Union of America.

HENRY HALLADAY, ESQ., Dorsey, Windhorst, Hannaford, Whitney & Halladay, 2300 First National Bank Building, Minneapolis, Minnesota 55402; on behalf of Cross-Appellee/Appellant, Northwest Airlines.

MR. HALLADAY:

• • •

(page 19 of transcript)

Now, responding again to Chief Judge Wright's inquiry, a decision was made at the time not to attempt to bring

(page 20 of transcript)

these unions into the case on the thesis that the rules did not make a third-party claim compulsory, and on the additional basis, Your Honor, which we met when we finally did try to bring the unions into the case, that the claim was not yet ripe, that it had not matured, and that the conditions precedent to bringing these two unions to the bar was the actual payment by Northwest under the traditional contribution rule that you can't bring a joint tortfeasor to brook until the tortfeasor in question held liable has paid more then its allocable share of that liability.

So, Your Honor, I don't seek forgiveness but I do render this a rational explanation of the procedural complexities which bring us before this Court in 1979 when in all fairness I would much prefer to have been here long, long since

and to thresh out the basic question of the policy of these statutes that cannot be taken to be meaningless but which says that the obligations to eradicate this last ignominious page from our history rests not just on employers but equally on unions.

QUESTION: There is no question about that. The statute makes that clear.

MR. HALLADAY: If the—

QUESTION: (inaudible)

MR. HALLADAY: If the statute makes it clear, Your Honor, and if it was not intended as something that was purely

(page 21 of transcript)

trekatory at the hands of Congress, and none of us can conceivably believe that, then the answer is to reverse the trial judge on his ruling under the Equal Pay Act and to affirm him on his ruling on Title VII and let us get to trial on this case which we have been urging and urging and urging ever since it was commenced. And there has been delay, Your Honor, in the prosecution of this particular case which I say in all honesty to this Court, delay has not been attributable to any foot-dragging on the part of Northwest Airlines or myself.

QUESTION: (inaudible)

MR. HALLADAY: No question about that, Your Honor. I couldn't agree more. I say, as a member of the bar of this Court, that there was a decision made at the time for strategic and procedural and meritorious reasons which then to me seemed to be sufficient, we did not interpret the rules as making it compulsory, as time began to go on we became more and more concerned about the question of time itself; when we finally made the motion that was denied as being too late, when we started the separate law suit again to get the issue up and to try to preserve evidence that was now beginning to disappear in the minds of missing witnesses, we once again were met at the threshhold with the question which took almost a year to get straightened out, that we

Supplemental Appendix B

were again already too soon, premature and couldn't sue.

(page 22 of transcript)

And we finally overcame that hurdle which has become the law of this case, we have a right to bring this declaratory judgment action but now we are met with the contention that eight years ago there was something we should have done which we failed to do, and I say in all fairness, Your Honor, the issues in this case warrant treatment that is not based upon that basis, with all respect to Your Honor.

Supreme Court, U.S.
FILED
OCT 24 1980
MICHAEL RODAK, JR., CLERK

No. 79-1056

IN THE

Supreme Court of the United States

October Term, 1980

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

and

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO

O'DONNELL & SCHWARTZ
Attorneys for Respondent Transport Workers Union of America, AFL-CIO
285 Madison Avenue
New York, N.Y. 10017
212-532-8900

Of Counsel:

ASHER W. SCHWARTZ

Question Presented

1. Whether an employer which, in the exercise of its own discretion, employed males only in a purser position and females in a cabin attendant position, and which has been adjudged for that reason to have discriminated against the female cabin attendants because of their sex in violation of Title VII of the Civil Rights Act, and which has also been adjudged to have violated the Equal Pay Act and Title VII by paying lower salaries to the female cabin attendants than it paid to the male pursers for equal work performed under similar working conditions, may thereafter claim contribution from the labor union representing such pursers and cabin attendants toward the payment of such judgment on the ground that the union is a party to a labor agreement which included such differential in pay.

TABLE OF CONTENTS

PAGE

Question Presented i

Table of Authorities v

Statement 1

A. The Salaries of Stewardesses and Pursers Were Fixed by NWA Before They Were Treated in Collective Bargaining Agreements 2

B. ALSSA, Transport Workers Union of America, AFL-CIO ("TWU"), Continued Its Bargaining Where ALSSA Left Off in 1961 3

C. TWU Sought to Make the Purser Position Available to Stewardesses Since 1963 by Collective Bargaining, But Was Unable to Do So Because of the Persistent Opposition of NWA 3

D. The U.S. District Court Found That NWA Violated the Equal Pay Act and Title VII of the Civil Rights Act, Not That the Collective Bargaining Agreements Violated the Acts 5

E. The Stewardesses' Bargaining Representatives Had Accepted the Company's Position That the Purser Position Performed Extra Duties of a Supervisory Nature Warranting a Higher Rate of Pay, But Opposed NWA's Insistence That the Purser Position Be Restricted to Men 5

Summary of Argument 6

PAGE

ARGUMENT—

I. NWA's Allegation That, By Virtue of Their Participation in the Negotiation, Execution and Implementation of Collective Bargaining Contracts With NWA Which Provided That NWA Pay Higher Salaries to Male Pursers Than to Female Cabin Attendants for Equal Work, TWU and ALPA are Liable, as Is NWA, for Violation of the Equal Pay Act and Title VII of the Civil Rights Act, Does Not State a Claim Against TWU and ALPA of Liability to NWA for Any Portion of NWA's Liability for Its Violation of the Acts 10

A. TWU and ALPA Did Not Cause or Attempt to Cause NWA to Violate the Equal Pay Act or Title VII 10

B. The Averment That TWU and ALPA Participated in the Negotiation of a Labor Agreement With NWA Which Includes a Provision That Grants Higher Salaries to Male Pursers Than to Female Cabin Attendants (J.A. 18, ¶ 7) Is Not Sufficient to Support a Claim That TWU or ALPA Violated the EPA, 29 USC §206(d)(2) or Title VII, 42 USC §2000e-2(c) 13

II. If a Duty of Contribution by a Union to an Employer in a Title VII or Equal Pay Act Proceeding Is Recognized by This Court Under Any Circumstances It Can Be Only Upon Equitable Grounds of Which There Are None That Favor NWA in This Proceeding 23

PAGE

A. NWA Alone Profited From Its Failure to Pay Stewardesses Rates of Pay Equal to Those Paid to Pursers 23

B. NWA Alone Violated the Civil Rights Act by Refusing Employment to Women in the Purser Position 25

C. NWA Refused to Open the Purser Position to Women or to Remove the Differential Lawfully 26

D. NWA's Claim for Contribution Is Not Addressed to Any Union Beneficiary of NWA's Violation of Either the EPA or Title VII 28

CONCLUSION 31

APPENDIX A—

Unpublished Judgment of Cir. Ct., D.C., in Appeal No. 79-1782 ..... 1a

APPENDIX B—

EEOC Decision 70-112, Case No. YAT 9-197, CCH, EEOC Decision 1973, ¶ 6108, P. 4159 ..... 5a

Table of Authorities

Cases: PAGE

Airline Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO, et al. v. *American Airlines,* (7th Cir. 1973) 490 F. 2d 636 ..... 17, 21

Airlines Stewards, etc., Local 550 v. *American Air-Lines, Inc.* (7th Cir. 1972) 455 F.2d 101 16

Albemarle Paper Co. v. *Moody,* (1975) 422 U.S. 405 21

Alexander v. *Gardner-Denver Co.,* (1974) 415 U.S. 36 ..... 16, 18

Allied Chemical & Alkali Workers of America v. *Pittsburgh Plate Glass Co.,* (1971) 404 U.S. 157 27

Burwell et al. v. *Eastern Airlines* (E.D. Va. 1978), 458 F. Supp. 474 20

Emporium Capwell Co. v. *Community Org.,* (1974) 420 U.S. 50 15

Ford Motor Co. v. *Huffman,* 345 U.S. 330 (1953) 18

Green v. *U.S. Steel Corp.,* (D.C.E.D. Pa. 1979), 481 F. Supp. 295 ..... 13, 27

Hairston v. *McLean Trucking Co.* (4th Cir. 1975), 520 F. 2d 226 21

Humphrey v. *Moore,* (1964) 375 U.S. 325 18

Johnson v. *Ryder Truck Lines, Inc.* (4th Cir. 1977), 555 F. 2d 1181 22

Laffey et al. v. *Northwest Airlines,* (D.D.C. 1973) 366 F. Supp. 763 and (D.D.C. 1974) 374 F. Supp. 1382 affirmed in part, vacated in part, (D.C. Cir. 1976), 567 F. 2d 429 *cert. denied,* (1978) 434 U.S. 1086 ....*passim*

PAGE

Lewis v. *United States,* —— U.S. ——, 63 L. Ed. 2d 198 (1980); 48 Law Week 4205 (1980) 10
Local 194, Retail, Wholesale and Department Store Union v. *Standard Brands, Inc.* (7th Cir. 1976), 540 F. 2d 864 21

Macklin v. *Spector Frieght Systems, Inc.* (D.C. Cir. 1973), 478 F. 2d 979 ..... 22n, 30n
Murphy v. *Miller Brewing Co.* (E.D. Wis. 1969) 307 F. Supp. 829, *aff'd* (7th Cir. 1972) 457 F. 2d 221 ..... 13, 19
Myers v. *Gilman Paper Corp.,* (5th Cir. 1977) 544 F. 2d 837 ..... 15, 19

Ray Marshall, Secretary of Labor v. *U.S. Postal Service, et al.* (D.D.C. 1978) 481 F. Supp. 179, aff'd in part, reversed in part, by unpublished judgment of Cir. Ct., D.C., in Appeal No. 79-1783 (Copy annexed as Appendix A) 17
Reiter v. *Sonotone Corp.,* (1979) 442 U.S. 330 10
Russell v. *American Tobacco Co.* (4th Cir. 1975), 528 F. 2d 357 21

Steele v. *Louisville & Nashville R.R. Co.,* (1944) 323 U.S. 192 ..... 17, 18

United Steelworkers of America v. *Warrior and Gulf Navigation Company,* (1960) 363 U.S. 574 14

Vaca v. *Sipes,* (1967) 386 U.S. 171 18

Westvaco Corp. v. *Adams Extract Co.,* No. 79-972 ..... 2, 23, 31
Williams v. *Norfolk and Western Railway Co.* (4th Cir. 1975), 530 F. 2d 539 22

Statutes: PAGE

Equal Pay Act of 1963—
29 U.S.C. § 206, et seq. ..... *passim*
29 U.S.C. § 206(d)(1) ..... *passim*
29 U.S.C. § 206(d)(2) 10, 11
29 U.S.C. § 255(a) 12

Fair Labor Standards Act—
29 U.S.C. § 201, et seq. 16

Federal Employers' Liability Act—
42 U.S.C. § 51, et seq. 16

Railway Labor Act—
45 U.S.C. § 152 ..... 14, 15
45 U.S.C. § 156 14

Title VII of Civil Rights Act of 1964—
42 U.S.C. § 2000e-2(a) 12
42 U.S.C. § 2000e, et seq. ..... *passim*
42 U.S.C. § 2000e-2(c) 10, 11

Other Authorities:

EEOC Decision 79-112, Case No. YAT 9-197, CCH EEOC Decision 1973 ¶6108, p. 4159 (Copy annexed as Appendix B) 19

Labor-Mangement Relations Act 31

Labor-Management Reporting and Disclosure Act of 1959 31

Labor Law Journal 394-5 (July 1980) 19

The Occupational Safety and Health Act (OSHA) 29 U.S.C. § 661, et seq. 16

IN THE

Supreme Court of the United States

October Term, 1980

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

and

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO

Statement

The obligation of a union at common law to contribute to the payment to its members of damages which were awarded against their employer for violation of the Equal Pay Act, 29 U.S.C. §206 et seq. ("EPA") and Title VII of the Civil Rights Act, 42 U.S.C. §2000e et seq. ("Title VII") is fully treated by our brethren representing the Air Line Pilots Association ("ALPA"). This brief will treat NWA's right to contribution from the Respondents.

This Court granted Northwest Airlines ("NWA") its petition for certiorari in this proceeding in tandem with

Westvaco Corp. v. *Adams Extract Co.*, No. 79-972, an anti-trust case. This brief will direct itself to showing that whatever may be the reason, if any, for supporting contribution in an anti-trust matter such as *Westvaco,* NWA has no claim for contribution from the respondent unions toward the payment of damages to employees they represent who have been denied fair wages on account of their sex. In doing so, the brief will refer to the Findings of Fact and Conclusions of Law in *Laffey et al.* v. *Northwest Airlines,* (D.D.C. 1973) 366 F. Supp. 763 and (D.D.C. 1974) 374 F. Supp. 1382 affirmed in part, vacated in part, (D.C. Cir. 1976) 567 F. 2d 429, cert. denied (1978) 434 U.S. 1086 as does the brief of NWA to this Court, dated August 1980, even though, unlike NWA, the Transport Workers Union ("TWU") was not heard in that proceeding.

A. *The Salaries of Stewardesses and Pursers Were Fixed by NWA Before They Were Treated in Collective Bargaining Agreements.*

Stewardesses were employed by NWA since at least 1927, 366 F. Supp., at 765 (¶6). They were first included in a collective bargaining agreement with the Air Line Stewards and Stewardesses Association, International ("ALSSA") on September 19, 1947, 366 F. Supp., at 766 (¶10). Pursers, all male, were first employed in 1947, but were not included in a collective bargaining agreement until January 1, 1949, 366 F. Supp., at 766 (¶11). That agreement maintained a differential established by NWA in 1947 and the agreements which followed continued the differential, as adjusted by equal or substantially equal percentage wage increases negotiated for pursers and cabin attendants. Pursers' salaries are, and always have been, approximately 30 to 55 percent higher than those of stewardesses of equal longevity engaged in domestic flying, and approximately 20 to 35 percent higher than steward-

esses of equal longevity engaged solely in foreign flying, 366 F. Supp., at 788 (¶80).

B. *ALSSA, Transport Workers Union of America, AFL-CIO ("TWU"), Continued Its Bargaining Where ALSSA Left Off in 1961.*

The respondent TWU began its representation of NWA pursers and stewardesses on July 7, 1961, when ALSSA became affiliated with TWU. It was then certified by the National Mediation Board as "Air Line Stewards and Stewardesses Association, International, Transport Workers Union of America, AFL-CIO" ("ALSSA, TWU"). ALSSA, TWU, in turn, was replaced by respondent Air Line Pilots Association, International, AFL-CIO ("ALPA"), on September 17, 1971, 366 F. Supp., at 765 (¶7).

Mary P. Laffey and others commenced an action against NWA in the United States District Court on July 15, 1970, alleging salary discrimination against them because of their sex. TWU was not charged in any Labor Department or EEOC proceeding and was not named as a defendant nor served with a cross-claim or joined as a party defendant in the District Court. On November 12, 1973, the District Court made specific findings of fact and conclusions of law, which appear in *Laffey et al.* v. *Northwest Airlines, Inc.*, 366 F. Supp. 763, *supra,* and which will be referred to herein as they relate to the argument on the issues in this proceeding. Judgment was entered against NWA on April 3, 1974, 374 F. Supp., at 1382.

C. *TWU Sought to Make the Purser Position Available to Stewardesses Since 1963 by Collective Bargaining, But Was Unable to Do So Because of the Persistent Opposition of NWA.*

NWA employed men only for the purser position from the very beginning of the establishment of that position

without any union agreement to such a restriction, 366 F. Supp. at 772 (¶ 37). The definition of a purser in the agreements signed by NWA and ALSSA made no reference to the gender of the purser, 366 F. Supp. at 766 (¶ 11).

ALSSA, TWU, began its effort to open the purser position to women in 1963 and 1964, when it proposed that stewardesses progress to purser vacancies in seniority order after the last flight service attendant who desired to become a purser had done so. The Company refused to agree to this proposal and it was not included in the agreement, 366 F. Supp. at 767 (¶ 22). In 1966 and 1967, one of NWA's opening proposals was that a single "cabin attendant" classification be established and that the rate of pay for this single classification be the lower stewardess rate of pay. The Union opposed this proposal and it was not adopted. The proposal violated the Equal Pay Act, 29 U.S.C. § 206(d)(1), by equalizing pay at the lower rate instead of the higher rate. TWU then proposed that stewardesses be permitted to advance to the position of purser in seniority order. The Company refused to accept TWU's proposal, but stated that it would agree to a provision permitting stewardesses to bid for purser vacancies if the Company was allowed a "right of selectivity." TWU agreed, on June 15, 1967, because it was convinced that it was the most it could achieve. 366 F. Supp., at 767-768 (¶ 23).

Employing its "right of selectivity", the Company thereafter avoided the employment of stewardesses and other females as pursers, despite the agreement of June 15, 1967, 366 F. Supp., at 768-773 (¶¶ 24-38). Mary Laffey alone became a purser in June 1968, and was able to serve as such until December 1970, when she was reduced to stewardess. 366 F. Supp., at 770-771 (¶¶ 31-35).

In the negotiations of 1969 and 1970, TWU proposed that stewardesses be allowed to progress to purser vacancies in

seniority order; that stewardesses who became pursers be credited with their full cabin attendant seniority; and that stewardesses who became pursers be slotted into the purser pay scale on the basis of their total cabin attendant seniority. The Company refused to agree to any of TWU's proposals. Its chief negotiator stated that the Company "prefers males and intends to have them", in the purser position. 366 F. Supp., at 778 (¶ 45). In each round of collective bargaining negotiations since at least the mid-1950's, the union proposed that stewardesses serving as Senior Cabin Attendant, receive a supplement to their pay. In each instance, the Company refused, 366 F. Supp., at 786 (¶ 70). In each instance, rates of pay for pursers and cabin attendants were raised in equal measure on a percentage basis, 366 F. Supp., at 788 (¶ 80) as is the practice generally followed in the airline industry.

D. ***The U.S. District Court Found That NWA Violated the Equal Pay Act and Title VII of the Civil Rights Act, Not That the Collective Bargainnig Agreements Violated the Acts.***

The U.S. District Court concluded, on November 22, 1973, that NWA discriminated on the basis of sex in violation of Title VII by excluding females from the purser position and violated the EPA and Title VII by paying female cabin attendants lower salaries than it paid to male pursers for equal work performed under similar working conditions. 366 F. Supp., at 789-790 (¶¶ 2, 4 and 5(a)).

E. ***The Stewardesses' Bargaining Representatives Had Accepted the Company's Position That the Purser Position Performed Extra Duties of a Supervisory Nature Warranting a Higher Rate of Pay, But Opposed NWA's Insistence That the Purser Position Be Restricted to Men.***

The Union's efforts to open the purser position to women has been described above. The U.S. District Court ordered

the entry of judgment on April 3, 1974, 374 F. Supp., 1382. In its Supplemental Memorandum, on page 1390, the Court stated that,

> "While this Court has found in fact that the jobs of purser and stewardess are in fact equal, it was not unreasonable for the Company to have believed otherwise. Five factors support this conclusion: the traditional practice of the Company in treating the positions as unequal, the general industry practice to the same effect, the acquiescence of the stewardesses' bargaining representative in this arrangement, the absence of any grievances or even suggestions from stewardesses to the contrary prior to the present controversy, and the absence of any clear legal precedent or guideline precisely in point."

Summary of Argument

A. The essence of the discrimination in this matter which is proscribed by the EPA and Title VII is not the differential in pay between the purser position and the cabin attendant position. It was a traditional practice of the Company and in the airline industry to maintain such a differential between those two positions. If women, as well as men, had been employed by NWA in the purser position, and men as well as women had been employed in the cabin attendant position, as required by Title VII, the differential in pay would not have been discriminatory on account of sex, and therefore not in violation of law. It is the exclusion of women from the purser position because of their sex that caused the differential in pay to be a violation of the Acts. NWA alone was responsible for such exclusions.

1. TWU opposed the exclusion of women from the purser position. NWA originated the practice. It

also followed a policy of employing females only in the cabin attendant position.

2. An employer's hiring and qualifications for hiring are a responsibility and prerogative of management and are not a mandatory bargaining issue. The employer alone is accountable for formulating and implementing its hiring policy.

B. TWU did not discriminate against a minority of its members. Its policy and practice on NWA was determined by the victimized female cabin attendants who outnumbered the male purser membership by more than 15 to 1 in an autonomous unit within TWU. They elected the negotiators who were responsible for the negotiation of their labor agreement, they proposed and ratified such agreements, and otherwise dominated the policies and practices of the union and those who were responsible for implementing them.

C. In maintaining across the board percentage increases in collective bargaining for all its members, including pursers and cabin attendants, TWU was conforming to sound union principles, to industrial practice in the airline industry, and to the will of its overwhelmingly female membership.

D. TWU did not "cause or attempt to cause" NWA to discriminate on the basis of sex. On the contrary, it resisted NWA's policy and practice of segregating males and females in its aircraft cabins as best it could through collective bargaining.

1. The acquiescence of TWU in the collective bargaining agreement and its participation in the negotiation of that agreement are not proof that *it* caused the employer to act as stated in the agreement.

Unlike agreements between parties whose bargaining relationship is a voluntary one, a Union is required by law to make and maintain agreements and to do so only with the employer whose employees it represents. Many items are included in a labor agreement as they are demanded by the employer. The Union's demand for equal treatment in wage rate improvements for pursers and cabin attendants in equal measure meant a continued discriminatory differential in pay between males and females after 1964 only because NWA insisted on hiring and assigning employees to the purser and cabin attendant positions on the basis of sex. NWA's proposal in 1966 and 1967 that cabin attendant salaries be paid to pursers and stewardesses at the lower stewardess rate was a proposed violation of the EPA, 29 U.S.C. §206 (d)(1).

E. The allegations in NWA's complaint that TWU and ALPA participated in the negotiation, execution and implementation of the agreement containing the differential between purser and cabin attendant rates of pay are thus not sufficient to state a claim that TWU and ALPA "caused or attempted to cause" NWA to pay lower salaries to female cabin attendants than it paid to pursers because of their sex.

F. If contribution by a labor union to an employer may be appropriate in a Title VII or EPA case, it is as an equitable remedy and, being such, NWA is not entitled to any contribution by TWU toward the payment of the Laffey judgment against the Company.

1. TWU and ALPA and their memberships gained nothing by the failure of NWA to pay to its nu-

merous stewardesses the higher salary that it paid to its few pursers.

2. The services performed by the stewardesses employed by NWA for which the higher purser salaries were owing to them were performed for the benefit of NWA, not TWU or ALPA.

3. The money NWA saved by paying stewardesses less in salary than it paid to pursers added to NWA's profits for many years, and added nothing to TWU's or ALPA's treasuries or to the income of their members from whom contribution is sought.

4. NWA's refusal to employ females in the purser position because of their sex was a violation by NWA of Title VII in which TWU and ALPA did not participate in any way. TWU urged, as early as the 1963 negotiations and thereafter, that the purser position be available to women, as well as to men.

ARGUMENT

I.

NWA's Allegation That, By Virtue of Their Participation in the Negotiation, Execution and Implementation of Collective Bargaining Contracts With NWA Which Provided That NWA Pay Higher Salaries to Male Pursers Than to Female Cabin Attendants for Equal Work, TWU and ALPA are Liable, as Is NWA, for Violation of the Equal Pay Act and Title VII of the Civil Rights Act, Does Not State a Claim Against TWU and ALPA of Liability to NWA for Any Portion of NWA's Liability for Its Violation of the Acts.

A. *TWU and ALPA Did Not Cause or Attempt to Cause NWA to Violate the Equal Pay Act or Title VII.*

> "The Court has stated repeatedly of late that in any case concerning the interpretation of a statute the 'starting point' must be the language of the statute itself. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979)."
>
> *Lewis* v. *United States*, —— U.S. ——, 63 L. Ed. 2d 198, at 206 (1980); 48 Law Week 4205 at 4207.

The EPA is plain and unambiguous as to the duty it imposes on labor organizations.

> "(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section *shall cause or attempt to cause such an employer* to discriminate against an employee in violation of paragraph (1) of this subsection . . ." (Emphasis supplied).
>
> 29 USC §206 (d) (2)

Title VII is equally plain and unambiguous.

> "(c) It shall be an unlawful employment practice for a labor organization—
>
> (3) *to cause or attempt to cause* an employer to discriminate against an individual in violation of this Section." (Emphasis supplied).
>
> 42 USC §2000e-2 (c)

"Cause" is what is done to bring about or effect a result. The invidious result which made NWA liable to its female cabin attendants under EPA and Title VII was not the differential in pay, but the payment of higher rates of pay to Pursers than to the Cabin Attendants *on the basis of sex.* NWA's brief acknowledges that "the EPA is addressed specifically to wage discrimination 'on the basis of sex.' 29 USC §206 (d) (1)." NWA brief, p. 21. The payment of higher salaries to some employees than to others even for equal work on jobs, the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, is not invidious or a violation of law unless it is for a reason proscribed by law. In this case the only proscribed reason for paying the differential is that it is founded upon the difference in the sex of the employees. NWA does not allege that the union included the differential in their agreements with NWA on the basis of sex. For reasons which will be discussed later in this brief it could not do so truthfully. To make its complaint appear to state that the unions caused the differential to be paid on the basis of sex, it alleges that, "On May 20, 1974, after Trial, said Court entered its Judgment which, among other things, found that, at all times since 1964 and 1965, respectively, the collective bargaining contracts between NWA, TWU and ALPA, as hereinbefore alleged, has violated EPA and Title VII by

providing for the payment of lower salaries for female Cabin Attendants than for male Pursers . . ." (J.A., p. 18, ¶17). The judgment of the Court made no such finding. It found:

> "2. Northwest Airlines, Inc., has discriminated on the basis of sex in willful violation of the Equal Pay Act, 29 USC §206 (d) (1), 29 USC §255 (a), on jobs the performance of which require equal skill, effort and responsibility and which are performed under similar working conditions by:
>
> a) paying female stewardesses lower salaries and pensions than male pursers.
>
> * * *
>
> 4. Northwest Airlines, Inc. has violated Title VII of the Civil Rights Act of 1964, 42 USC §2000e-2 (a), (hereinafter "Title VII"), by paying female stewardesses lower salaries and pensions than male pursers for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.
>
> 5. Northwest Airlines, Inc. has violated Title VII:
>
> a) by discriminating against females because of their sex in filling purser vacancies from July 2, 1965 to date."
>
> *Laffey* v. *Northwest Airlines, Inc.* (D.D.C. 1973) 366 F. Supp. 763, at 789.

NWA is attempting to assert a union liability for NWA's unlawful conduct by transposing the Court's Finding in *Laffey* from a Finding that *NWA* violated the Acts into a Finding that *the labor agreements* violated the Acts and

thus the unions violated the Acts because they participated in the negotiation, execution and implementation of the agreements. To repeat, this was not the Finding of the Court and, unlike the Finding, projects a rationale which ignores the plain language of the statutes, viz., that the unions' duty was to refrain from causing NWA to pay a higher rate of pay to Pursers than to Cabin Attendants *on the basis of sex.* It did not have a duty to refrain from causing NWA to pay a higher rate of pay to Pursers than to Cabin Attendants. It was also not a duty of the union not to enter into a labor agreement covering the entire gamut of rates of pay, rules and working conditions because one of its impacts was to provide higher rates of pay for a purser position which was occupied only by males than it provided for a cabin attendant position which was occupied by females when NWA refused to permit females to serve in the higher paid position over the opposition of the union.

B. *The Averment That TWU and ALPA Participated in the Negotiation of a Labor Agreement With NWA Which Includes a Provision That Grants Higher Salaries to Male Pursers Than to Female Cabin Attendants (J.A. 18, ¶ 7) Is Not Sufficient to Support a Claim That TWU or ALPA Violated the EPA, 29 USC §206 (d) (2) or Title VII, 42 USC §2000e-2 (c).*

The Courts recognize that there is a distinction to be made between union liability for its conduct and for purely employer conduct when the union is a party to an agreement which includes a provision with an unlawful impact. *Murphy* v. *Miller Brewing Co.,* (E.D. Wis. 1919) 307 F. Supp. 829 aff'd (7th Cir. 1972) 457 F. 2d 221. *Green* v. *U.S. Steel Corp.* (D.C.E.D. Pa. 1979) 481 F. Supp. 295.

> "When most parties enter into a contractual relationship they do so voluntarily, in the sense that there is no

> real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability pre-exists the negotiations."
>
> *United Steelworkers of America* v. *Warrior and Gulf Navigation Company,* (1960) 363 U.S. 574 at 580.

In the absence of an agreement in collective bargaining under the Railway Labor Act, the terms of employment are fixed by the employer, or are continued as they exist in the agreement being renegotiated, Railway Labor Act, 45 USC §§152, 156. There is an economic coercion upon the employees for their union to reach an agreement. The labor agreement covers many subjects and either party may agree to one proposal simply to obtain another. In the absence of any facts as to the role of a union in the negotiation of an offending provision, its participation in the negotiation of the agreement merely shows its acquiescence to all its terms, but shows nothing as to its responsibility for the offending provision.[1] A failure to bargain away existing employer misconduct does not "cause" this misconduct. One does not cause an existing result by failing to undo it, particularly when one tries.

Must employees work without an agreement because their employer will not sign an agreement without altering

---

[1] The addition of the words, "execution and implementation" to "negotiation," in NWA's complaint (J.A., p. 18 ¶7), adds nothing of substance to its allegation, since "execution" of the agreement is implicit in the fact of "negotiation" and the only possible "implementation" of the wage clause in a labor agreement is the payment of the wages as agreed upon, which was solely a function for NWA to perform, unless its claim for contribution from the unions, in this case, is sustained.

a strict company policy the result of which is that an innocent and essential provision of the agreement becomes unlawful because of the discriminating impact of the company policy? In this case, must the Pursers and Cabin Attendants have worked without a labor agreement whose terms of compensation, including the differential, may have been acceptable to them but which resulted in an illegal impact because NWA insisted on employing men only in the higher paid position and women only in the lower paid position? While NWA's offense in this connection is not stated in the complaint, it is the Finding of the Court upon which NWA allegedly rests its claim for contribution. *Laffey, supra,* 366 F. Supp. 763 at 772, 773 (¶¶37-38), 789 (¶5).

Is the union obligated to undertake a costly strike to enforce a statutory duty of the employer, viz, to open up the higher paid position to members of both sexes? There is no guarantee of success in a strike. It is costly. It defeats the purposes of the *Railway Labor Act,* §2, 45 U.S.C. §152, which mandates that employers and unions make reasonable efforts to reach agreements without interruption of service.

In *Emporium Capwell Co.* v. *Community Org.,* (1974), 420 U.S. 50, 69, the Court emphasized that Title VII rights "cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA." In *Myers* v. *Gilman Paper Co.* (5th Cir., 1977), 544 F. 2d, 837 at 857, the Court stated:

> "We are reminded that while Title VII expresses an important national policy, it does not exist in a vacuum. Important national policies also emanate from the NLRA. . . ."

Congress has afforded rights and protections to employees in several forms. One establishes a process of union representation and collective bargaining. The other is the enactment of a number of statutes, such as the Fair Labor Standards Act, 29 U.S.C. §201, et seq., the Federal Employers Liability Act, 45 USC §51, et seq., the Occupational Safety and Health Act ("OSHA") 29 U.S.C. §661, et seq., Title VII and others. These establish substantive rights which employees may claim independently of their unions and of the process of collective bargaining. *Alexander* v. *Gardner-Denver Co.,* (1974) 415 U.S. 36. Unions have not been appointed exclusive representatives for the vindication of such direct statutory rights.

> "Title VII, unlike the National Labor Relations Act and Railway Labor Act, does not create nor necessarily recognize powers of exclusive representation, either for those currently employed in the unit nor for a group which would include those claiming to have been unlawfully discharged. The situation is not parallel, and it does not seem to us that policy reasons militate in favor of similar status for the bargaining representative. An individual who claims to have been the victim of unlawful discrimination has the right to redress individually, whether the discrimination was an isolated act or a general practice.
>
> 'The real party in interest in conciliation endeavors is the employee alleged to have been discriminatorily treated. He is completely free to accept or reject the proposals of union or employer as well as the position taken by the [Equal Employment Opportunities] Commission.' Air Lines Stewards, etc. Loc. 550 v. American Airlines, Inc., 455 F. 2d 101, 106 (7th Cir., 1972).

> Surely the fact that a labor organization is defined in 42 U.S.C. §2000e and made a potential defendant in unlawful employment practice cases does not, as counsel seems to suggest, indicate an intention on the part of Congress that a collective bargaining representative play a special role in Title VII actions to redress unlawful employment practices by an employer."
>
> *Airline Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO, et al* v. *American Airlines,* (7th Cir. 1973) 490 F. 2d 636 at 641-642.

See *Ray Marshall, Secretary of Labor* v. *U.S. Postal Service, et al.* (D.D.C. 1978) 481 F. Supp. 179, aff'd in part, reversed in part, by unpublished judgment of Cir. Ct., D.C., in Appeal No. 79-1783, affirming denial of intervention by the National Association of Letter Carriers in a Fair Labor Standards Act matter. (Copy annexed as Appendix A).

Statutory rights are acts independent of the duty of fair representation, as formulated in *Steele* v. *Louisville & Nashville R.R. Co.,* (1944) 323 U.S. 192. The enforcement of statutory rights is not a part of the union's statutory obligation as exclusive bargaining representative. They are not the subject of the collective bargaining process. *Steele, supra,* does not make them so. *Steele* and its progeny imply a duty in the areas where Congress has vested the union with "exclusive" power both to create and restrict the rights of employees and requires that in exercising that power the unions not be motivated by bad faith and that they act without hostile discrimination.

> "We hold that the language of the Act to which we have referred, read in the light of the purposes of

> the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."
>
> *Steele* v. *Louisville & Nashville R.R. Co., supra,* 323 U.S. 192 at 202-203.
>
> Also see *Ford Motor Co.* v. *Huffman,* (1953) 345 U.S. 330; *Humphrey* v. *Moore,* (1964) 375 U.S. 325; *Vaca* v. *Sipes,* (1967) 386 U.S. 171.

Congress did not intend that parties would bargain about whether employers would discriminate. There is nothing to bargain about. Indeed, the contractual remedy is not well-suited to the final vindication of Title VII rights. *Alexander* v. *Gardner-Denver, supra.*

The purpose of the Railway Labor Act is to maximize industrial peace. To read Title VII or EPA as imposing a requirement that parties negotiate to an impasse toward a solution of discrimination problems increases the risk of strikes, which would work at cross purposes to a basic objective of the Railway Labor Act and the National Labor Relations Act.

Congress assigned the policing function to the EEOC and appropriated monies with which it could carry out its function. The unions do not have a duplicate responsibility which would impose substantial costs on the employees represented by the union, some or all of whom may be the victims of the discriminatory process, as they are in this case.

Union officers must be democratically elected under the LMRDA and responsive to the desires of the membership.

They may not wish to pay dues to enforce Title VII rights. Congress did not intend to force them to do so.

The EEOC has reached the conclusion that a union's good faith effort in negotiations to obtain equal opportunity provisions without the cooperation of the employer evidences a lack of culpability of the union. 31 *Labor Law Journal,* pp. 394-395 (July, 1980). Also see EEOC Decision 70-112, Case No. YAT 9-197, CCH EEOC Decision 1973 ¶6108 p. 4159 (Sept. 5, 1969). (Copy annexed as Appendix B.)

For these reasons, it is not enough to charge the unions with violation of EPA and Title VII by simply alleging, as has NWA, (J.A. p. 18 ¶7) that the labor organizations participated in the negotiation of a labor agreement, particularly when it has been found that the part of it which is invidious is so only because of a discrimination on the basis of sex which arises out of the employer's exclusion of women from a higher paid position, 366 F. Supp. 763, at 789 (¶5 (a)), a condition of employment which the labor organization is not alleged to have negotiated or to which it agreed. *Murphy* v. *Miller Brewing Co.* (D.C., E.D. Wis. 1969) 307 F. Supp. 829, aff'd (7th Cir. 1972) 457 F. 2d 221.

We realize that there are precedents below to the contrary. E.g., in *Myers* v. *Gilman Paper Corp.,* (5th Cir. 1977) 544 F. 2d 837 the Circuit Court refused to accept a similar argument proposed by the United Paperworkers International Union ("UPIU").

> "UPIU contends that given this limited union role, a union has a good defense to back pay liability where it has urged the employer to comply with Title VII and has taken a bargaining position to achieve compliance yet lacks sufficient bargaining power to obtain

employer agreement. This argument is not relevant to the primary issue below—whether a defendant is or has engaged in conduct that discriminates on the basis of race or that perpetuates past discrimination. Rather, the argument is germane as to which defendant should bear primary responsibility for the illegal conduct. The court did not err in holding that UPIU had no "business necessity" defense.

In so ruling, the Fifth Circuit has chosen to ignore the plain language of the statute. "It shall be an unlawful practice for a labor organization to cause or attempt to cause an employer to discriminate . . ." One cannot reasonably say that a union which "has taken a bargaining position to achieve compliance, yet lacks sufficient bargaining power to obtain employer agreement", has *"caused or attempted to cause"* the employer to violate Title VII or EPA. It has no economic choice in such a bargaining process other than to sign an agreement. The blindness of the Court to the language of the statute remains with the Court's treatment of the union's efforts to avoid the discriminatory terms as being only a question as to "which defendant should bear primary responsibility for the illegal conduct".

Another illustration of how the courts go astray in evolving their own concept of invidious discrimination without regard to the plain language of the statute is found in *Burwell, et al.* v. *Eastern Airlines* (E.D. Va. 1978), 458 F. Supp. 474. The District Court in *Burwell* found Eastern's mandatory maternity leave policy to be discriminatory. It also declared that the Union "is guilty of unlawful discrimination" because the Union "acquiesced in the discrimination and never so much as filed a grievance" (*Ibid.*, p. 502). The acquiescence was evidenced by the Union's collective

bargaining agreement which contained the mandatory leave policy. Yet the Court found that:

> ". . . as a practical matter the Union was virtually powerless to alter Eastern's policy. But cf. *Local 194, Retail, Wholesale and Department Store Union* v. *Standard Brands, Inc.*, 540 F.2d 864 (7th Cir. 1976); *Airline Stewards and Stewardesses Association, Local 550* v. *American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973). The policy was in no real sense the product of negotiation. It was unilaterally imposed by Eastern. The Union acquiesced under protest. As of July 2, 1965, the Union faced a number of discriminatory practices imposed by Eastern with respect to women. Female flight attendants at that time stood to lose their jobs if they married or had a child. The Union, in good faith, began to whittle away at these practices in a logical progression. The vigor with which the Union attacked maternity related issues was undoubtedly limited by the absence of support within its general membership.
>
> The Court is aware that back pay awards serve a dual purpose of compensating victims of discrimination and inducing both employers and unions to voluntarily eliminate illegal employment practices. *Albermarle Paper Co.* v. *Moody, supra,* 422 U.S. at 418, 95 S. Ct. 2362; *Russell* v. *American Tobacco Co., supra,* 528 F.2d at 366; *Hairston* v. *McLean Trucking Co.*, 520 F.2d 226, 231 (4th Cir. 1975).[2] In the instant case, however, the

[2] The cases which base union liability on acquiescence through the signing of labor agreements with a discriminatory effect or impact and assert an affirmative duty on the part of the union to negotiate out such discriminatory effect or impact, never do so on the basis of the language of the statute they are applying. They simply make a judicial interpretation that it would be beneficial to the purposes of Title VII or the EPA to delegate to unions the job of enforcing the Acts. The federal agencies created by Congress for

> Union was more than willing to eliminate the illegal practice. It was Eastern and not the Union which insisted on the policy and refused to alter it. The Union initiated the only bona fide efforts to secure for women flight attendants the right to continue working during pregnancy. Under these circumstances, assessment of back pay awards remain against defendant Eastern only. *Johnson* v. *Ryder Truck Lines, Inc.*, 555 F.2d 1181 (4th Cir. 1977); *Williams* v. *Norfolk and Western Railway Co.*, 530 F.2d 539, 543 (4th Cir. 1975)."
>
> Id. 458 F. Supp. 474 at 503.

On Eastern Airlines, as on NWA, the Union's general membership was overwhelmingly female. The Findings upon which the above Conclusions of Law were based are stated on pp. 489 and 490 of 458 F. Supp. 474. With such findings, a determination that the Union "caused" the carrier to violate Title VII in thus "acquiescing" to the agreement containing the employer's discriminatory policy is incredible. The absence of an assessment of back pay against the Union in *Burwell* and in *Myers* does not make it any less so.

---

enforcing its mandates are not liable for damages to the employees for whose protection of benefits they were appointed, but unions, these Courts say, are liable to them if they fail to carry out their judicially determined responsibilities. See *Macklin* v. *Spector Freight Systems* (D.C. Cir., 1973), 478 F.2d 979, at 989.

II.

If a Duty of Contribution by a Union to an Employer in a Title VII or Equal Pay Act Proceeding Is Recognized by This Court Under Any Circumstances It Can Be Only Upon Equitable Grounds of Which There Are None That Favor NWA in This Proceeding.

A. *NWA Alone Profited From Its Failure to Pay Stewardesses Rates of Pay Equal to Those Paid to Pursers.*

This is not a proceeding, as in *Westvaco Corp.* v. *Adams Extract Co.*, No. 79-972, in which the defendants engaged in a combination or conspiracy with the plaintiff and shared or were intended to share in the benefits which were derived from it.

TWU gained nothing by the failure of NWA to pay to its numerous stewardesses the higher salary rates that it paid to its few pursers.[3] TWU also had nothing to gain by NWA's payment of the higher salary rates to the pursers. The benefit inured only to NWA. What in effect is being claimed by NWA is that TWU caused NWA to save millions of dollars by its participation in the negotiation of a labor agreement paying less in salary to the stewardesses than should have been paid to them under the Acts.

NWA might argue that had it not been for the collective bargaining agreement, it would have paid the pursers only the rates of pay afforded to the stewardesses. This contention was not made in its complaint herein because it is wholly untenable. As stated by the U.S. Court of Appeals in *Laffey, supra:*

> ". . . Beyond that, the Union's agreement to negotiated terms is hardly evidence of an individual member's

---

[3] "As of April 25, 1970, NWA employed 137 male cabin attendants, all as pursers, and 1747 cabin attendants, all but one as stewardesses." *Laffey, supra,* 366 F. Supp. 763 at 773, ¶38.

> appraisal of the skills, efforts, and responsibilities essential to performance of the jobs. Particularly is this so where, as here, the union was bound to represent pursers as well as stewardesses, and took on that responsibility at a time when earlier company policy had already created a status quo under which pursers were more highly paid than stewardesses. Since the union's obligation thenceforth was to seek pay raises benefiting all its members, it obviously was not in a position to alter substantially the position of one constituent group at the expense of another. And when the union did attempt to win better treatment for stewardesses, it encountered stiff resistance from NWA. The only logical inference from this combination of circumstances is that as a matter of strategy—not attributable to any belief as to the comparability of the two jobs—the union chose to forego a special demand for equality for the stewardesses in order to achieve more pressing bargaining objectives."
>
> *Laffey* v. *Northwest Airlines, Inc.*, (D.C. Cir. 1976) 567 F.2d 429 at 447.

When NWA purported to attempt an equalization of pay, it proposed, in 1966 and 1967, that cabin attendant salaries be paid to pursers and stewardesses at the lower rate then paid to stewardesses. *Laffey, supra,* 366 F. Supp. 763, at 767-768. (¶23) The Union can hardly be faulted for rejecting this proposal since it flouted the terms of the EPA.

> (d)(1) "No employer having employees subject to any provisions of this section shall discriminate . . . between employees on the basis of paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . : Provided, that an employer who is paying a wage rate differential in

> violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."
>
> 29 U.S.C. § 206(d)(1)

NWA attempted, in *Laffey, supra,* to use the collective bargaining agreement as a cloak for shielding itself against blame for its discriminatory treatment of females in connection with its higher pay rates for pursers. Having failed, it now seeks to compel the Union to pay a part of the wages which it alone was obligated to pay to the stewardesses for services rendered solely on behalf of NWA, at no gain to TWU. NWA seeks a windfall payment from TWU, which, if successful, would tend to encourage employers to include low discriminatory rates of pay in collective bargaining agreements, since, if challenged, it would cost them only what they otherwise would have to pay if they complied with the law, less what the Union would be compelled to pay to them by way of contribution.

B. *NWA Alone Violated the Civil Rights Act by Refusing Employment to Women in the Purser Position.*

> *Laffey, supra,* 366 F. Supp. p. 763, at 778 (¶ 45), 789 (¶ 5(a)).

The complaint makes no allegation that TWU was responsible for NWA's discrimination against females in filling purser positions, nor was it so. A differential in pay between positions, even if their performance requires equal skill, effort and responsibility and are performed under similar working conditions, is not a violation of law. It is a violation of law only if the differential is based on sex (EPA and Title VII), or race (Title VII). The reason Laffey and the others prevailed in their claim of discrimination in the payment of lower rates of pay to the steward-

ess position than were paid to the purser position is because NWA would place only males in that position. Neither TWU nor its agreement with NWA restricted the purser position to males.

C. *NWA Refused to Open the Purser Position to Women or to Remove the Differential Lawfully.*

Laffey findings, 366 F. Supp. 763, et seq., show that NWA always maintained that the purser's position was a more responsible position than was the stewardess position, requiring more training and additional qualifications and, most significant of all, that it could only be filled by a male. NWA has never been so bold as to allege that TWU or ALPA insisted that it hire and employ males only in the purser position and females only in the stewardess or cabin attendant position.

In 1964, by virtue of the enactment of the EPA, NWA and, for the moment, we will assume TWU, were required to examine into this sex oriented distinction, and as concluded by the Court below in 1973, to treat the two positions as being of equal skill and responsibility. To avoid an offense to the Act, therefore, either the positions had to be made available to members of both sexes at the then existing differential in rates of pay, or the differential had to be eliminated.

As appears in the *Laffey* Findings, 366 F. Supp., at 767 (¶¶ 22, 23) and 778 (¶ 45), TWU attempted the former course of making the purser position available to women, since it and NWA believed the differential was still warranted by the duties and responsibilities of the purser and stewardess positions, and a similar differential in pay was maintained elsewhere in the industry with members of both sexes occupying the higher paid purser positions. Furthermore, the females in the NWA operation represented by

TWU, and who dominated ALSSA, TWU on NWA, did not request removal of the differential but requested only that the higher paid position of purser be made available to them despite the circumstance of their sex. Had NWA agreed to TWU's demand in this respect, NWA would not have been liable to its stewardesses for purser pay because the payment of the differential would no longer have been based upon the sex of its occupants.

The Union's representation function as to any member of the bargaining unit begins after he or she is employed. A job applicant is not represented by the Union until he or she has been hired and assigned by management to a job in the bargaining unit which the Union represents.

> *Chemical Workers* v. *Pittsburgh Plate Glass Co.* (1971), 404 U.S. 157, 181, n.20;
>
> *Green, et al.* v. *U.S. Steel Corp., et al.* (E.D., Pa. 1979), 481 F. Supp., 295, at 314.

The qualifications for hiring applicants are therefore not a mandatory issue of bargaining. The Unions were not able to bargain effectively for a provision in the agreement that would require the Company to hire persons of either sex. NWA, and the airline industry, admittedly refused to allow Unions to have any voice in the selection of males or females for cabin attendant positions.

The duty of fair representation thus does not reach the female applicant for the purser position, because of the absence of any right of the Union to represent her. The Union cannot be placed by Title VII under an obligation to bargain with the employer on her behalf to prevent sex discrimination.

The Union did make an effort to prevent discrimination against females on account of sex after they were hired

as cabin attendants by proposing in negotiations that the purser position be available to them in the exercise of seniority, 366 F. Supp. 763, at 767-768 (¶23). The effort was frustrated by NWA's concept of male superiority for the purser position, *Id.*, p. 769 (¶¶26-28, 36-38, 45).

The other avenue available to NWA and TWU for complying with the EPA, and later Title VII, would have been to remove the differential in pay between purser and stewardess. This apparently occurred to NWA in 1966 and it proposed such a recourse but, in doing so, as has heretofore been explained, it was suggesting another offense against the EPA, because it was proposing a reduction in pay to the stewardess level rather than as required by 29 U.S.C. §206(d)(1), an increase to the higher rate of pay. This proposal was not palatable to TWU, not only for the obvious industrial and organizational reasons, but for the legal reasons as well.

NWA, having failed and refused to open the purser position to females in 1965 to comply with Title VII, it was obligated to increase the rates of pay to stewardesses for services rendered to NWA. It is now claiming contribution to that payment by TWU, on equitable grounds, because the agreements made by NWA and TWU adopted neither possible remedy, even though it was NWA which rejected them both.

D. *NWA's Claim for Contribution Is Not Addressed to Any Union Beneficiary of NWA's Violation of Either the EPA or Title VII.*

NWA claims that somehow the Union, TWU, shared in the fruits of NWA's payment of lower wages to its stewardesses than was required by law (NWA brief, p. 36). It is not clear, however, in what respect TWU made or could have made any profit or acquired any benefit as claimed.

TWU is an International Union in the AFL-CIO and represents workers in many industries and establishments who have no relationship to each other as employees. They are organized as local unions. The NWA cabin attendants, male and female, were members of a small flight attendant local union named ALSSA before affiliating with the International TWU. After affiliation, its members continued to have their own officers and treasury and governed themselves, contributing a minor portion of their monthly dues to the International Union, which furnished them with guidance, assistance in bargaining and processing grievances, giving them a voice in the labor movement of the United States through the AFL-CIO, assisting them in their problems with administrative agencies such as the Civil Aeronautics Board, National Mediation Board, Federal Aviation Administration, Labor Department and the like but leaving the negotiation of their agreements with NWA to their negotiators, subject to ratification by their membership alone.

The NWA cabin attendants were overwhelmingly female because NWA would only employ females in the numerous stewardess positions. The females, who are the beneficiaries of the judgment of the Court below, dominated NWA's negotiations by their greater number of members of the negotiation committee, by their votes for proposals to be submitted to management, and by their votes for or against the ratification of their agreements with NWA, 366 F. Supp. at 765-766 (¶18).

TWU did not cause a controlling faction of TWU members to use their power to gain advantage over its minority or female members, as often occurs in cases in which a black minority or females are denied advantageous terms of employment for the benefit of a white majority or males

who dominate the Union.[4] On the contrary, the overwhelming majority of ALSSA, TWU's members employed by NWA were the victims of its discriminatory practice and suffered with a lower rate of pay than was paid to the minority of males. Neither TWU nor its membership gained anything by the inferior treatment afforded to the overwhelmingly female membership of the NWA Local who controlled it.

TWU received dues from the cabin attendants, male and female, in equal amounts and without regard to their rates of pay. It received nothing from NWA. The thousands of other TWU members, in local transit systems, on railroads, in universities, and on other airlines, received nothing from NWA or the NWA cabin attendants. They contributed per capita to the International in the same proportion as did the NWA cabin attendants, receiving the same services from the International Union. The servicing of the relatively small contingent of NWA flight attendants was subsidized by the large local unions which contributed the major portion of funds required by the International Union to render services to all local unions in whatever degree they required such services. No equitable consideration would warrant a contribution from all TWU members to help NWA pay its indebtedness to the female members of TWU who were employed by NWA, who negotiated the discriminatory agreement and who alone will receive the benefit of the judgment against NWA.

NWA's comparison of TWU to a business establishment based upon total annual receipts, NWA brief, pp. 44-45, fn. 31, is a distortion, is contrary to fact, and is completely inconsistent with the non-profit concept which underlies

---

[4] E.g. *Macklin* v. *Spector Freight Systems, Inc., supra,* 478 F.2d 979, at 989.

the status of labor unions under the Railway Labor Act, the Labor-Management Relations Act, and the Labor-Management Reporting and Disclosure Act.[5] All of TWU's income is derived from per capita payments made by its members and most of it is devoted to the servicing of its members in their relationships with their employers. The rest of it is used to service its members at Congress, the Courts, state and federal agencies and the AFL-CIO itself. NWA's claim for contribution from these funds to help meet its obligation to pay its employees for services rendered to NWA in accordance with the law is beyond reason! It bears no comparison to the position of the defendants and claimants for contribution in an anti-trust matter, such as *Westvaco Corp.* v. *Adams Extract Co., supra.*

CONCLUSION

An employer charged with a violation of the Equal Pay Act or Title VII of the Civil Rights Act has no right of contribution from the Union representing his employees simply on the basis of their contractual relationship. On their face, the Acts require affirmative action by the Union to make it culpable for a violation of the Act. The collective bargaining relationship is a special one created by law which mandates the negotiation and execution of labor agreements. They do not constitute the affirmative action upon which a claim of violation of the Acts may be based without inquiry into the positions taken and efforts made by the Union in the negotiation of the agreements. Since the complaint of NWA in this proceeding is based wholly upon the

---

[5] The same Form LM-2 to which NWA's brief refers on p. 44 in describing TWU's total receipts of $8.13 million in the fiscal year 1979 shows that TWU's total cash disbursements for that year was $8,366,173.

participation of the Union respondents in the negotiation of their labor agreements, it fails to state a cause of action for contribution under the Acts or at common law.

The complaint asserts a claim for contribution on the basis of the Findings and Conclusions of Law in *Laffey et al.* v. *NWA,* 366 F. Supp. 763, aff'd in part 567 F.2d 429. The Findings establish that the exclusion of females from the purser position and its higher rate of pay, antedate the labor agreements which cover the purser position and were established by NWA without Union participation. They also show that the Unions attempted to remove the exclusion of women from the purser position but failed because of NWA's opposition. The differential in pay between the purser position and cabin attendant position violates no law and is offensive to EPA and Title VII only because NWA, on its own, restricted the purser position to males. NWA's only attempt to remove the differential failed because it proposed a further violation of the EPA by reducing the pay rate of the purser position to that of the cabin attendant position.

The failure of NWA to cross-claim against the respondent Unions or to join them as party defendants has prejudiced the Unions in asserting their defenses upon the facts if their culpability for NWA's violation of the Acts should be submitted to a trial court. NWA is guilty of laches.

The judgment of the Court of Appeals, affirming the judgment of the District Court dismissing NWA's claim for contribution under the EPA should be affirmed. The judgment of the District Court denying the motions of the Union respondents to dismiss the Title VII claims should be reversed or remanded to the Court of Appeals with direction to reverse the District Court, or in the alternative, the judgment of the Court of Appeals remanding the case to

the District Court in order that the District Court may consider the issue of laches should be affirmed.

Respectfully submitted,

O'Donnell & Schwartz

By Asher W. Schwartz
Attorneys for Respondent Transport Workers Union of America, AFL-CIO
285 Madison Avenue
New York, N.Y. 10017
212-532-8900

Of Counsel:

Asher W. Schwartz

October 25, 1980

APPENDIX

APPENDIX A

Unpublished judgment of Cir. Ct., D.C., in Appeal No. 79-1783.

Not to be published—see Local Rule 8 (f)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

[No Opinion]

September Term, 1979

Civil Action No. 78-0602

No. 79-1741

RAY MARSHALL, Secretary of Labor,

v.

UNITED STATES POSTAL SERVICE
MARION CHASTAIN *et al.* and MOZART G. RATNER,

Appellants

No. 79-1759

RAY MARSHALL, Secretary of Labor

v.

UNITED STATES POSTAL SERVICE
EMANUAL T. EVANS, *et al.*,

Appellants

Appendix A

No. 79-1783

RAY MARSHALL, Secretary of Labor

v.

UNITED STATES POSTAL SERVICE
NATIONAL ASSOCIATION OF LETTER CARRIERS, *et al.*,

Appellants

Appeals from the United States District Court
for the District of Columbia.

Before:

WRIGHT, *Chief Judge,* MACKINNON, *Circuit Judge,*
and GASCH,* *District Judge.*

JUDGMENT

These causes came on to be heard on the record on appeals from the United States District Court for the District of Columbia and were argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

The disposition of this litigation has been delayed by procedural problems in the District Court involving attempts by three groups of applicants, appellants in these cases, to intervene in an action brought by the Secretary of Labor. In our view, Section 16(c) of the Fair Labor Standards Act, 29 U.S.C. § 216(c) (1976), does not, in terms,

---

* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

prohibit employees from intervening in an action brought on their behalf by the Secretary.

On consideration of the special facts of these cases, particularly the position of the Secretary that, with the exception of the National Association of Letter Carriers, intervention should be permitted.

It is ORDERED and ADJUDGED by this court that the judgment of the District Court denying intervention is hereby vacated except with respect to the National Association of Letter Carriers, which part of the District Court judgment is hereby affirmed.

It is FURTHER ORDERED that appellants Marion Chastain *et al.* and Mozart G. Ratner, Emanual T. Evans *et al.*, and Angel L. Correa, Robert W. Dunn, and Wilburn Taylor, Sr. be permitted to intervene in *Marshall* v. *United States Postal Service,* Civil Action No. 78-0602. The intervention of appellants Chastain *et al.* and Ratner shall be solely for the purpose of raising the question concerning the alleged existence of the so-called "non-plaintiff agreement." Inasmuch as a finding by the District Court that such an agreement exists and is enforceable may pretermit some of the issues raised in the Secretary's action, the interests of efficiency and conserving judicial resources suggest that the District Court should proceed expeditiously to resolve this issue before proceeding with trial of the Secretary's action.

Except for the issue concerning the alleged existence of the "non-plaintiff agreement," the intervention of appellants Evans *et al.* and Correa, Dunn, and Taylor "is limited to the claims of illegality presented by the Secretary's complaint." *Trbovich* v. *United Mine Workers,* 404 U.S. 528, 537 (1972). The District Court may place such other ap-

propriate restrictions on their intervention as may be necessary for the efficient conduct of this complex litigation.

Per Curiam

For the Court

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

A true copy:

Test: George A. Fisher
United States Court of Appeals
for the District of Columbia Circuit

By: /s/ (Illegible), *Deputy Clerk*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED JUN 04 1980
GEORGE A. FISHER, *Clerk*

FILED JUN 27 1980
JAMES F. DAVEY, *Clerk*

APPENDIX B

EEOC Decision 70-112, Case No. YAT 9-197, CCH. EEOC Decision 1973, ¶ 6108, P. 4159.

[¶ 6108]

WAGE SCHEDULE ARRANGEMENT DISCRIMINATES ON BASIS OF SEX

Decision of Equal Employment Opportunity Commission, Decision No. 70-112, Case No. YAT9-197, September 5, 1969.

Title VII—Civil Rights Act of 1964

Employer—Sex Discrimination—Segregated Job Classifications—Wage Schedule Arrangement—Prevailing Community Wage Plan.—Reasonable cause existed to believe that an employer discriminated against female employees because of their sex by rating their jobs at a lower wage schedule than male jobs. Evidence showed that the employer, under its union contract, divided its employees into two groups. One group consisted of traditionally all-female classifications and the other group consisted of traditionally all-male job classifications. Different wage classifications were assigned to each job category allegedly pursuant to a community wage system. A contention by the employer that different wage rates for men and women were justified under the prevailing community wage system, which operated under a theory of labor supply within a community, did not excuse the resulting sex bias, since the system as followed by the employer operated to favor male employees by granting them higher wages than females. The employer failed to show that local labor market conditions, rather than sex bias, were the basis for the different wage schedules for each job.

Union Sex Discrimination—Collective Bargaining Contract Sanctioning Discriminatory Job Classifications and

Appendix B

Wage Schedules—Opposition to Unlawful Clauses.—Reasonable cause did not exist to believe that a union committed sex discrimination with respect to female employees by reason of unlawful discriminatory clauses in a contract with their employer, in view of the union's opposition to the clauses and its proposed non-discriminatory substitutes which were rejected by the employer.

FACTS

Charging parties allege that employer and union local jointly and severally have committed and are committing unlawful employment practices by discriminating against charging parties with respect to compensation because of their sex.

Charging parties are female employees of employer who are within the bargaining unit as defined in the collective bargaining agreement. Charging parties individually allege that employer and union incorporate in their collective bargaining agreement a wage rate based on a "prevailing community wage" principle which discriminates against them because of their sex. Respondents deny the charge.

Employer alleges that local variations in wage schedules are based solely upon local variations in supply and demand for the various services and skills required by Respondent.

For wage purposes the collective bargaining agreement divides employer's 116 job classifications into two groups. One group is entitled Appendix A, and includes what employer describes as "clerical and related" jobs. The second group is entitled Appendix B, and includes what employer describes as "craft and related" jobs. The Commission notes that Appendix A jobs are traditionally all-female classifications, while Appendix B jobs are traditionally all-male.

Appendix B

Charging parties' complaint does not allege disparity in the base wages assigned to Appendix A jobs; rather, the complaint alleges disparity in the schedule adjustments made for Appendix A jobs vis-a-vis Appendix B jobs.

Under the collective bargaining agreement, one of four schedules is attached to each of the 731 facilities, depending primarily on employer's assessment of the local supply of skills and services needed by the respective facilities and, to a lesser extent, upon a cost-of living factor. Schedule 1 is to be assigned to facilities where demand for telecommunication skills is highest and Schedule 4 is to be assigned where demand for such skills is lowest. The situation now existing in many of the 731 facilities is that one wage schedule is applied to Appendix A jobs and another to Appendix B jobs. Such is the case at the facility where Appendix A jobs (which include charging parties' positions) are on Wage Schedule 3 and Appnedix B jobs receive Wage Schedule 2. Charging parties allege this disparity is because of their sex.

In many exchanges, only jobs from one Appendix exist, but in 463 towns both men and women are employed. In 216 of these towns, or 46.8 percent, the same wage schedule is applied to both Appendices. In 243 of these towns, or 52.6 percent, a wage schedule one or two steps lower is applied to Appendix A or female jobs. In 3 towns, a wage schedule one step lower is applied to Appendix B, or male jobs. At Employer's facility, Appendix A jobs are entirely female and Appendix B jobs are entirely male.

Employer sums up its position as follows:

> Since labor market conditions and other factors relevant to wage determination are not necessarily the same in any particular locality for clerical workers as for plant craft workers, it goes without saying that the

> same town may well be in a relatively higher schedule for craft wage purposes than for clerical wages. This is exactly what sometimes happens and it is true in the . . . town(s) represented by the charge(s).

FROM TEXT OF EEOC DECISION

In a recent Commission Decision (AT-6-0-636 et al., April 21, 1969) involving this same employer and the same wage plan and collective bargaining agreement, we found that Respondent's wage schedule arrangement discriminates on the basis of sex in violation of Section 703(a)(1) of Title VII.

We make the same decision here as to the charges against Respondent Employer, for the reasons articulated in the above-cited Commission Decision.

In that Decision we stated as follows:

> While Respondent characterizes the Appendix A jobs as "clerical" and the Appendix B jobs as "craft," it is clear that some of the Appendix A jobs, e.g., janitress, are not clerical and some of the Appendix B jobs, e.g., janitor, are not craft. What is equally clear is that all of the Appendix A jobs are traditionally all-female classifications while all of the Appendix B jobs are traditionally all-male classifications.[2] Therefore Respondent's argument reduces to the contention that "the same town may well be in a relatively higher schedule for [male] wage purposes than for [female]

---

[2] With respect to these "male jobs," where the issue has arisen, the Commission and the Courts have rejected [*] contention that sex is a bona fide occupational qualification therefor. See, e. g., *Weeks* v. *Southern Bell Telephone and Telegraph Company,* [59 LC ¶ 9213] 408 F. 2d 228 (C. A. 5, 1969).

* Identifying detail deleted in official text.—CCH.

wages." In short, without regard to nature of the work, Respondent has assigned jobs to Appendix A or to Appendix B because of the sex of the persons traditionally performing these jobs. We believe that such assignment and grouping because of sex, under the circumstances here, constitutes unlawful segregation because of sex in violation of Section 703(a)(2) of Title VII.

In addition, since such assignment and grouping in most cases results in relatively lower wages for the Charging Parties and for females as a class, these practices also violate Section 703(a)(1).

Where, as here, a "prevailing community wage" adjustment system frequently operates to favor male employees, but virtually never operates to favor female employees, it is incumbent upon an employer to come forward with convincing evidence to show that, in fact, local labor market conditions rather than sex discrimination are the basis (sic) for the different wage schedules for each job. Here there is no such evidence. Surely the Commission cannot be expected to accept, without any supporting data, that, in over half of Respondent's exchanges employing females, all "male" jobs, including Janitors and Assignment Men, are more difficult to fill than all "female" jobs, including Janitress and Assignment Clerks.

Accordingly, we conclude that reasonable cause exists to believe that Respondent discriminates against Charging Parties and similarly situated females because of their sex, by rating their jobs at a lower schedule than male jobs, in violation of Section 703(a) of Title VII.

Appendix B

[*Charges Against Union*]

As to the charge against Respondent Union, Respondent Union contends that since 1945 it has consistently opposed the Company's "community wage" theory. Respondent Union cites, as an example, a proposal offered by it during contract negotiations in April, 1968, to place all towns on the same wage schedule for all Company departments. This proposal was rejected by Respondent Employer.

In light of the documentary evidence in the record that Respondent Union did actively oppose the inclusion of the unlawful features of the wage plan, we conclude that Respondent Union has not committed an unlawful employment practice within the meaning of Section 703(c) of Title VII.

Supreme Court, U. S.
FILED
NOV 21 1980
MICHAEL RODAK, JR., CLERK

No. 79-1056

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NORTHWEST AIRLINES, INC.,
Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO, *et al.*
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF NORTHWEST AIRLINES, INC.,

PHILIP A. LACOVARA
Hughes Hubbard & Reed
1660 L Street, N.W.
Washington, D.C. 20036
(202) 862-7400

Attorney for Petitioner
Northwest Airlines, Inc.

Of counsel:

Gerald Goldman
David W. Spears
William R. Stein
Marcy J. K. Tiffany

CERTIFICATE UNDER SUPREME COURT RULE 28.1

Petitioner Northwest Airlines, Inc., has no parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates.

TABLE OF CONTENTS

	Page
CERTIFICATE	i
TABLE OF AUTHORITIES	iv
I. THE ISSUE BEFORE THE COURT IS THE EXISTENCE OF A COGNIZABLE CLAIM TO CONTRIBUTION; ANY OTHER DEFENSES ARE PREMATURE	1
A. Truth and Sufficiency of Allegations of Union Complicity	1
B. Lack of Equity	2
II. THE EEOC'S CURRENT POSITION ON CONTRIBUTION IS ENTITLED TO NO SPECIAL WEIGHT	4
III. THE COURT HAS THE POWER TO RECOGNIZE A CONTRIBUTION REMEDY FOR BACKPAY UNDER FEDERAL EMPLOYMENT DISCRIMINATION STATUTES	5
A. Power to Fashion Equitable Remedies to Allocate Liability	5
B. Power to Recognize Contribution Remedy	8
C. Federal Question Jurisdiction over Contribution Claim	10
D. Jurisdiction without EEOC Charge against Union	11
IV. CONTRIBUTION EFFECTUATES CONGRESSIONAL INTENT TO MAKE UNIONS LIABLE FOR CAUSING DISCRIMINATION	13
A. Congress Did Not Intend to Preclude Contribution for Backpay Liability	13

Page

B. Congress Did Not Intend to Allow Unions to Be Immunized from Backpay Liability 13

C. Contribution Does Not Conflict with the Remedial Scheme of Title VII 16

1. Title VII administrative procedures 16

2. Conciliation 17

3. Prompt assertion of claims 19

D. Effective Allocation of Liability Will Not Retard Enforcement 20

1. Union enforcement 20

2. Employee enforcement 22

3. Settlements 23

V. CONTRIBUTION IS ALSO WARRANTED FOR EQUAL PAY ACT LIABILITY 24

A. Contribution Rests on Congressional Intent to Use Union Financial Liability under the Act as a Deterrent to Wage Discrimination 24

B. Contribution for Equal Pay Act Backpay May Be Predicated on Union Liability under a Different Theory 26

CONCLUSION 28

TABLE OF AUTHORITIES

Cases:	Page
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) ..	13,14,18
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)	7,12,16
ALSSA v. American Airlines, Inc., 490 F.2d 636 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974)	23
Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968)	11
Bell v. Hood, 327 U.S. 678 (1946)	11
Blanton v. Southern Bell Telephone & Telegraph Co., 49 F.R.D. 162 (N.D. Ga. 1970)	26
Board of County Commissioners v. United States, 308 U.S. 343 (1939)	7
Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945)	25
Burwell v. Eastern Air Lines, Inc., 458 F. Supp. 474 (E.D. Va. 1978)	21
Cannon v. University of Chicago, 441 U.S. 677 (1979)	6,7,13
Carriers Insurance Exchange v. Truck Insurance Exchange, 310 F.2d 653 (4th Cir. 1962)	10
Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1968)	19
Cohen v. United States, 1975-1 U.S.T.C. §9391 (E.D. Mich. 1975)	10
Communications Workers v. Illinois Bell Telephone Co., 12 E.P.D. ¶11,275 (N.D. Ill. 1973)	27
Cooper Stevedoring Co., Inc. v. Fritze Kopke, Inc., 417 U.S. 106 (1974)	8,9,10
Corning Glass Works v. Brennan, 417 U.S. 188 (1974)	25
Cort v. Ash, 422 U.S. 66 (1975)	5,6
Dawson v. Contractors Transport Corp., 467 F.2d (D.C. Cir. 1972)	16
DiBenedetto v. United States, 1975-1 U.S.T.C. ¶9503 (D.R.I. 1974)	10

	Page
Dobbins v. Crain Brothers, Inc., 567 F.2d 559 (3d Cir. 1977)	10
D'Oench Duhme & Co. v. FDIC, 315 U.S. 447 (1942)	8
Dole v. Dow Chemical Co., 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288	9
EEOC v. Steamfitters Local 638, 542 F.2d 579 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977)	14
Electrical Workers Local 790 v. Robbins & Myers, Inc., 429 U.S. 229 (1976)	12
Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973)	4,5
Farmer v. Hotel Workers Local 1064, 19 E.P.D. ¶9075, 99 L.R.R.M. 2166 (E.D. Mich. 1979)	27
Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404 (1969)	10
General Electric Co. v. Gilbert, 429 U.S. 125 (1976)	4
Gilbert v. General Electric Co., 59 F.R.D. 267 (E.D. Va. 1973)	26
Globus, Inc. v. Law Research Service, Inc., 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd per curiam*, 422 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971)	9
Glus v. G.C. Murphy Co., 23 F.E.P. Cas 86 (3d Cir. 1980), *petition for certiorari pending*, No. 80-461 (filed September 22, 1980)	6,8,12, 23
Gomes v. Brodhurst, 394 F.2d 465 (3d Cir. 1968)	9,23
Gould v. American-Hawaiian Steamship Co., 387 F. Supp. 163 (D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976)	9
Great American Federal Savings & Loan Association v. Novotny, 422 U.S. 366 (1979)	17
Grogg v. General Motors Corp., 72 F.R.D. 523 (S.D.N.Y. 1976)	12
Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974)	21
Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952)	10
Illinois v. Milwaukee, 406 U.S. 91 (1972)	7,11

	Page
International Brotherhood of Teamsters v. Daniel, 439 U.S. 551 (1979)	4
Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975)	12,16,27
Johnson v. Robison, 415 U.S. 361 (1974)	11
Jones v. Schramm, 436 F.2d 899 (D.C. Cir. 1970)	16
Knell v. Feltman, 174 F.2d 662 (D.C. Cir. 1949)	14
Laffey v. Northwest Airlines, Inc., 366 F. Supp. 763 (D.D.C. 1973)	*passim*
Laffey v. Northwest Airlines, Inc., 374 F. Supp. 1382 (D.D.C. 1974), *aff'd in part, vacated in part and remanded*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978)	*passim*
Lynch v. Sperry Rand Corp., 62 F.R.D. 78 (S.D.N.Y. 1973)	26
Mataya v. Behm Motors, Inc., 409 F. Supp. 65 (E.D. Wisc. 1976)	9
McCain v. Clearview Dodge Sales, Inc., 574 F.2d 848 (5th Cir. 1978)	9
McDonald v. General Mills, Inc., 387 F. Supp. 24 (E.D. Cal. 1974)	12
Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969)	18
Miree v. DeKalb County, 433 U.S. 25 (1977)	2
Moore v. Sunbeam Corp., 459 F.2d 811 (7th Cir. 1972)	12
Morton v. Ruiz, 415 U.S. 199 (1974)	5
New Castle County Airport Commission v. CAB, 371 F.2d 733 (D.C. Cir. 1966), *cert. denied*, 387 U.S. 930 (1967)	5
Newport Air Park, Inc. v. United States, 419 F.2d 342 (1st Cir. 1969)	16
Northwest Airlines, Inc. v. EEOC, (D.D.C. Civ. No. 80-2192), *appeal pending*, (D.C. Cir. No. 80-2342)	5,11
Northwest Airlines, Inc. v. Transport Workers Union, 606 F.2d 1350 (D.C. Cir. 1979)	6
Osborne v. McCall Printing Co., 4 F.E.P. Cas. 276 (S.D. Ohio 1972)	12
Overnight Motor Transport Co. v. Missel, 316 U.S. 572 (1942)	25

	Page
Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924 (5th Cir. 1975)	12
Russell v. American Tobacco Co., 528 F.2d 357 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976)	19
Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1956)	10
Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970)	19
Sanchez v. Trans World Airlines, Inc., 499 F.2d 1107 (10th Cir. 1974)	12
Scheuer v. Rhodes, 416 U.S. 232 (1974)	2
Secretary of Agriculture v. United States, 347 U.S. 645 (1954)	5
Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970)	25
Stevenson v. International Paper Co., 432 F. Supp. 390 (W.D. La. 1977)	27
Stier v. Park Pontiac, Inc., 391 F. Supp. 397 (S.D. W.Va. 1975)	9
Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957)	7
Tiper v. E. I. duPont de Nemours & Co., Inc., 443 F.2d 125 (6th Cir. 1971)	18
Touche Ross & Co. v. Redington, 442 U.S. 560 (1979)	6
Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979)	6,7,13
Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977)	4
Trent v. Allegheny Airlines, Inc., 431 F.Supp. 345 (W.D. Pa. 1977), *dismissed after trial on other grounds*, 471 F.Supp. 488 (W.D. Pa. 1979)	18
Tunstall v. Locomotive Firemen, 323 U.S. 210 (1944)	11
United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (1975)	4
United States v. Gilman, 347 U.S. 407 (1954)	8
United States v. Standard Oil Co., 332 U.S. 301 (1947)	8
United Steelworkers v. Weber, 443 U.S. 193 (1979)	20

	Page
Vaca v. Sipes, 386 U.S. 171 (1967)	6,7,16, 27
Weinberger v. Salfi, 422 U.S. 749 (1975)	11
Statutes:	
Government in the Sunshine Act, 5 U.S.C. § 552b	5
Internal Revenue Code, 26 U.S.C. § 6672	10
Judiciary and Judicial Procedure Act,	
28 U.S.C. § 1331	10,11
28 U.S.C. § 1337	11
Labor-Management Relations Act of 1947, 29 U.S.C. § 160	3
Fair Labor Standards Act, 29 U.S.C. §§ 201-219, 255	24,25
Equal Pay Act of 1963, 29 U.S.C. § 206(d)	*passim*
Landrum-Griffin Act of 1959, 29 U.S.C. § 412	3,15
Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.*	10
Title VII of Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*	*passim*
Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103	17
Interstate Commerce Act, 49 U.S.C. §§ 1 *et seq.*	10
Legislative History:	
H.R. 11677, 87th Cong., 2d Sess. (as passed by the House, July 25, 1962) (108 Cong. Rec. H13809 (daily ed.))	25
Hearings on the Equal Employment Opportunity Commission Before a Subcommittee of the Senate Committee on Appropriations, 96th Cong., 2d Sess. (1980)	19
Oversight Hearing on Equal Employment Opportunities Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 95th Cong., 1st Sess. (1977)	17
118 Cong. Rec. 3965 (1972)	17
118 Cong. Rec. 3962 (1972)	17
118 Cong. Rec. 3372-73 (1972)	17

Page

Miscellaneous:

P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* (2d.ed. 1973) 7

EEOC Compliance Manual (CCH) § 62.7(c) (1979) 18

EEOC, *5th Annual Report, Appendix: Detailed Statistics on Charges* (1971) 19

E. Glassberg, N. Baden & K. Gerstel, *Absent From the Agenda: A Report on the Role of Women in American Unions* (Coalition of Labor Union Women Center for Education and Research 1980). 21

H. Hill, *Black Labor and the American Legal System* (BNA 1977) 21

Comment, *The Bennett Amendment—Title VII and Gender-Based Discrimination,* 68 Geo. L.J. 1169 (1980) 4

Note, *The Federal Common Law,* 82 Harv. L. Rev. 1512 (1969) 7

Note, *Toward a Workable Rule of Contribution in the Federal Courts,* 65 Colum. L.Rev. 123 (1965) 9

Restatement (Second), Torts § 886A (1979) 8

R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978) 2

C. Taylor & R. Charleston, *Contribution Would Promote Title VII, Pay Act Goals,* Legal Times of Washington, November 10, 1980 5

U.S. Civil Rights Commission, *The Challenge Ahead: Report on Equal Opportunity in Referral Unions* (May 1976) 20

U.S. Department of Labor, Bureau of Labor Statistics, *Directory of National Unions and Employee Associations, 1979* (September 1980) (Bull. No. 2079) 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1056

NORTHWEST AIRLINES, INC.,
Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF NORTHWEST AIRLINES, INC.

I. THE ISSUE BEFORE THE COURT IS THE EXISTENCE OF A COGNIZABLE CLAIM TO CONTRIBUTION; ANY OTHER DEFENSES ARE PREMATURE.

A. Truth and Sufficiency of Allegations of Union Complicity.

At the threshold, both respondents seek to defeat Northwest's contribution claim (1) by renouncing responsibility for the purser-stewardess pay differential that underlies Northwest's complaint and (2) by denying that their conduct violated either Title VII or the Equal Pay Act. This case comes before the Court, however, on the basis of the unions' motions to dismiss Northwest's complaint for failure to state a legally cognizable claim (JA 39-41). For purposes of these motions, the unions and the Court must assume the truth of the

allegations in the complaint. *See, e.g., Miree v. DeKalb County,* 433 U.S. 25, 27 n.2 (1977); *Scheuer v. Rhodes,* 416 U.S. 232, 236-37 (1974). The relevant allegation of the complaint is that in collective bargaining each union regularly "demanded" continuation of that differential and that the union conduct perpetuated the differential throughout the entire backpay period (JA 17-18 ¶6).[1]

This allegation adequately establishes union complicity for the purpose of deciding whether, as a matter of law, an employer like Northwest may assert a contribution claim against unions like TWU and ALPA. Although TWU refuses to recognize the correctness of the decisions, it necessarily concedes that "there are precedents" that sustain union backpay liability for the conduct alleged (TWU Br. 19). *See also* Northwest's opening brief at 20 n.16. Moreover, the unions' motions to dismiss did not challenge the legal sufficiency of the allegations that the unions' conduct was actionable. Neither the district court nor the court of appeals had the opportunity to address the question. Thus, the existence of underlying union liability must be assumed here.[2]

B. Lack of Equity.

TWU's contentions that Northwest's claim should fail for lack of equity (Br. 23-31) similarly turn on issues of fact that

---

[1] The unions struggle to undermine the related *Laffey* finding that in 1966 Northwest proposed to eliminate the differential but that TWU refused to agree to that change. *See* 366 F. Supp. at 767-68 (¶23). That proposal would have eliminated any basis for the backpay liability that has been fastened solely on Northwest. While admitting that it did oppose Northwest's proposal, TWU suggests that its agreement to the proposal would have violated the "downward equalization" prohibition of the Equal Pay Act, 29 U.S.C. § 206(d)(1). *See* TWU Br. 4.

That suggestion, however, is only a convenient afterthought. The prohibition applies only to "equal" jobs, but TWU admits that its insistence upon preserving the differential was based on the belief— shared with Northwest—that "the differential was still warranted by the [differing] duties and responsibilities of the purser and the stewardess positions . . ." (Br. 26).

[2] Furthermore, since the unions did not cross-petition for certiorari, they are improperly inviting the Court to order relief beyond what they obtained from the court of appeals. *See* R. Stern & E. Gressman, *Supreme Court Practice* 480, 481 (5th ed. 1978).

are outside the record and thus not a basis for decision at this stage. Those contentions, moreover, are subject to dispute. For example, TWU argues that contribution would not be equitable in this case because the unions "gained nothing" from the differential and that "the benefit inured only" to Northwest. (TWU Br. 23). The relative benefits from the challenged practices are not of record in this case, but the position asserted by TWU is demonstrably misleading.[3]

The argument is also just a distraction from the legal issue before the Court. TWU itself concedes that there are:

> "often . . . cases in which a black minority or females are denied advantageous terms of employment *for the benefit of a white majority or males who dominate the Union.*" TWU Br. 29-30 (emphasis added).

Thus, it is not relevant at this stage whether ALPA or TWU had independent incentives to discriminate. The point is that union leadership or majorities may well have such a self-interested motive. It is that incentive that contribution would curtail or neutralize.[4]

---

[3] Throughout the backpay period, Northwest paid its stewardesses (as well as its male FSAs and stewards) approximately the same wages paid to the basic cabin attendant classifications on competing airlines, while the small group of pursers received about one-third more. *See, e.g.*, Declaration of Terry M. Erskine, Director of Labor Relations for Northwest, dated June 15, 1978, and filed in the district court in *Laffey* on June 20, 1978. Preservation of the differential financially benefitted only the individual male purser-members of TWU and ALPA.

[4] TWU also argues that it is somehow inequitable for a "non-profit" union to pay for the injury suffered by employees as a result of the union's wrongful activities. In providing for backpay awards against unions in Title VII, Congress has expressed its view that this responsibility is not at all inequitable. 42 U.S.C. § 2000e-5(f), (g). TWU's premise would also nullify the congressional judgment in statutes like the Labor-Management Relations Act of 1947, 29 U.S.C. § 160, and the Landrum-Griffin Act of 1959, 29 U.S.C. § 412, that union treasuries are answerable for injury inflicted by the union, even if the victims are themselves union members.

II. THE EEOC'S CURRENT POSITION ON CONTRIBUTION IS ENTITLED TO NO SPECIAL WEIGHT.

Two years ago the EEOC filed a 76-page brief as *amicus curiae* in the court below (excerpted *infra* in Reply App. A), arguing (1) that the federal courts have power to recognize a contribution remedy (Reply App. 5a-7a), (2) that "there can be little doubt that recognition of a right to contribution will further the enforcement of Title VII" (Reply App. 9a), and (3) that "nothing" in Title VII's charge-filing requirement "precludes, or conflicts with, the assertion of a claim for contribution by one joint violator of the Title against another" (Reply App. 10a). Before this Court, however, the EEOC has reversed field completely on these issues. The EEOC's 3-2 repudiation of its original unanimous position prompted Commissioner J. Clay Smith to issue a strongly worded dissent (reprinted *infra* as Reply App. B), explaining why "[n]othing has changed in law or in fact which warrants the Commission reversing this original position." (Reply App. 2b).

As this Court has seen, the EEOC surpasses any other agency in administrative inconsistency.[5] On several occasions the Court has criticized sudden reversals of EEOC position on issues of law. *See, e.g., Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 76 n.11 (1977); *General Electric Co. v. Gilbert,* 429 U.S. 125, 140-45 (1976); *Espinoza v. Farah Manufacturing Co.,* 414 U.S. 86, 94-95 (1973). This case, unfortunately, is another in this series. Since the EEOC's "position flatly contradicts what appears to be a rather careful statement of the Commission's views" only two years ago, the Court should "accord no special weight to its views." *United Housing Foundation, Inc. v. Forman,* 421 U.S. 837, 858 n.25 (1975) (SEC). *See also Int'l Brotherhood of Teamsters v. Daniel,* 439 U.S. 551, 566 (1979).[6]

---

[5] *See, e.g.,* Comment, *The Bennett Amendment—Title VII and Gender Based Discrimination,* 68 Geo. L.J. 1169, 1177-78 (1980), cataloging some of these inconsistencies.

[6] Neither the Solicitor General nor the EEOC has suggested that today's assessment of the impact of a no-contribution rule is based on any concrete experience showing that the two-year old position in favor of contribution was

(*footnote continues*)

Moreover, in order for the EEOC to claim any deference, its position "must be consistent with the congressional purpose." *Morton v. Ruiz*, 415 U.S. 199, 237 (1974). Courts "need not defer to an administrative construction of a statute where there are 'compelling indications that it is wrong.' " *Espinoza v. Farrah Manufacturing Co., supra*, 414 U.S. at 94-95. This is precisely such a case.[7]

III. THE COURT HAS THE POWER TO RECOGNIZE A CONTRIBUTION REMEDY FOR BACKPAY UNDER FEDERAL EMPLOYMENT DISCRIMINATION STATUTES.

A. Power to Fashion Equitable Remedies to Allocate Liability.

Respondent ALPA and several *amici* argue that federal courts lack the authority to recognize the equitable remedy of contribution for liability imposed under federal statutes unless the proponent of the remedy can demonstrate an affirmative congressional intent to permit contribution. The predicate for this proposition is *Cort v. Ash*, 422 U.S. 66 (1975), and other

---

(*footnote continued*)

unfounded. In the absence of any demonstrable factual ground for changing a position that is, at bottom, based on predictions of impact, there is no basis for crediting the EEOC's new position. *See, e.g., Secretary of Agriculture v. United States*, 347 U.S. 645, 653 (1954); *New Castle County Airport Comm'n. v. CAB*, 371 F.2d 733, 735 (D.C. Cir. 1966), *cert. denied*, 387 U.S. 930 (1967).

[7] Two commentators have recently written that the EEOC's announced rationale—to offer "immunity" to unions—"is political rather than legal, and should be addressed to Congress rather than the courts." C. Taylor & R. Charleston, *Contribution Would Promote Title VII, Pay Act Goals*, Legal Times of Washington, November 10, 1980, at 20, 21.

In a suit brought by Northwest under the Government in the Sunshine Act, 5 U.S.C. § 552b, the district court ordered release of the recording of the closed meeting at which the EEOC adopted its new position, but after the EEOC represented that those records would be of "tremendous benefit" to Northwest before this Court, the court of appeals stayed that order. *Northwest Airlines, Inc. v. EEOC* (D.D.C. Civ. No. 80-2192), *appeal pending* (D.C. Cir. No. 80-2342). The Chief Justice on November 14, 1980, declined to vacate the stay.

cases concerning implied "rights of action" for damages.[8] The focus on this line of cases, however, betrays a fundamental misconception about this case. In the "implied right of action" cases, this Court has been asked to require a party to respond in damages for a statutory violation when the statute itself did not impose monetary liability for that violation. As Mr. Justice Powell explained in *Cannon v. University of Chicago*, 441 U.S. 677, 746 (1979) (dissenting opinion), by creating a private action "a court of limited jurisdiction necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve" and creates liability that Congress has not imposed.

In a contribution case like this one, the role of the federal court is fundamentally different. This case rests on the premise that Congress itself has imposed potential monetary liability on unions as well as employers for violation of the federal employment discrimination laws. In these circumstances, the Court has long affirmed the courts' responsibility for allocating the liability, even without express congressional direction. *See* Northwest's opening brief at 19-21, 40-42. For example, in *Vaca v. Sipes*, 386 U.S. 171, 187-88 (1967), this Court held that "the courts must fashion an appropriate remedy" that allocates liability between employer and union where a "union's breach of duty will have enhanced or contributed to the employee's injury."

Where the undertaking is merely the fashioning of remedies among parties who are subject to statutory backpay liability, therefore, the methodology of *Cort v. Ash* and its progeny is not apt.[9] Once Congress made the underlying

---

[8] *E.g., Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

[9] Indeed, use of the *Cort v. Ash* factors to assess contribution claims would effectively bar any claim of contribution, since, as both the court below and Judge Higginbotham in *Glus* have noted, "the party requesting contribution, by definition, will never be a member of the class" for whose "especial benefit" the statute was enacted. *Glus v. G.C. Murphy Co.*, 23 F.E.P. Cas. 86, 91 (3d Cir. 1980), *petition for certiorari pending* (No. 80-461); *see Northwest Airlines, Inc. v. Transport Workers Union*, 606 F.2d 1350, 1354 (D.C. Cir. 1979) (Pet. App. 8d).

decision to impose backpay liability on unions for violating the employment discrimination laws, it left "remedial details to judicial implications." *Board of County Commissioners v. United States,* 308 U.S. 343, 349 (1939). Congress has necessarily assigned to the federal courts the "authority to embrace a dispute" about the allocation of financial liability between employers and unions that violate the employment discrimination laws. *Compare Cannon, supra,* 442 U.S. at 746.

This Court has often recognized the judicial responsibility to fashion remedies—or, in appropriate cases, substantive rules—as interstitial "federal common law" that fleshes out a statutory scheme.[10] In *Illinois v. Milwaukee,* 406 U.S. 91 (1972), for instance, although the "remedy sought by Illinois [was] not within the precise scope of remedies prescribed by Congress" in a statute, the Court held that a further remedy existed under the federal common law. 406 U.S. at 103. The Court stated that "the remedies which Congress provides are not necessarily the only federal remedies available." *Id.* Similarly, in *Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1957), the Court held that, once the federal courts were given jurisdiction over certain labor cases, they could formulate substantive and remedial rules as a matter of federal common law, and could fill in the interstices of the statute "by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy." 353 U.S. at 456-57.[11]

The Court has not retreated from this definition of the proper judicial function. In *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 19 (1979), for example, the Court

---

[10] *See, e.g., Illinois v. Milwaukee,* 406 U.S. 91 (1972); *Vaca v. Sipes, supra; Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1957). *See generally* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 770 (2d ed. 1973); Note, *The Federal Common Law,* 82 Harv. L. Rev. 1512, 1523 (1969).

[11] Just as with the labor statutes in *Lincoln Mills,* once Congress acted comprehensively in the field of employment discrimination, the federal courts acquired power to fashion federal common law remedies in the "penumbra" of federal statutes. *See* 353 U.S. at 457. The Court has already recognized that Congress has entrusted the federal courts with "plenary" remedial power to implement the employment discrimination statutes. *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 45 (1974).

explained the propriety of judicial fashioning of suitable remedies by noting that, when Congress pronounces conduct unlawful, it intends that "the customary legal incidents" of that determination will follow.[12]

B. Power to Recognize Contribution Remedy.

In this case, the Court is called upon to do no more than to apply the prevailing rule in this country regarding the allocation of concurrent liability. The Court has already exercised its power to formulate a contribution remedy in *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974). This case calls for approval of the application of the contribution rule in but another context governed by federal law.

Although many states first embraced the contribution principle by statute, the origin of contribution as the prevailing rule does not crimp the Court's remedial power. The courts may properly look to a steady legislative consensus in formulating the evolving common law of remedies. *Cf. D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447, 472 (1942) (Jackson, J., concurring) (federal common law may borrow from "all the sources of common law" and any "principles of established credit in jurisprudence"). The plain fact is that contribution is now the rule in almost all states and constitutes the "common law" rule on this issue. *See Glus v. G.C. Murphy Co.*, 23 F.E.P. Cas. 86, 88 (3d Cir. 1980); *Restatement (Second), Torts* § 886A (1979). As the EEOC itself emphasized in the court below when it urged recognition of contribution in this case, "the modern trend . . . has been to recognize a right to contribution under federal law." (Reply App. 6a). Indeed, ALPA and *amici* accurately concede that almost all courts that have faced the issue have concluded that contribution is appropriate for Title VII liability. *See* Northwest's opening brief at 38-39 & n.28.[13]

---

[12] For these reasons, the reliance placed by ALPA and *amici* on *United States v. Standard Oil Co.*, 332 U.S. 301 (1947) and *United States v. Gilman*, 347 U.S. 507 (1954), is inapposite, since the government there sought to have the Court impose liability on a party upon whom Congress had not.

[13] It is difficult to credit the assertion of *amici* that contribution may not be recognized by a court in the absence of statutory authorization because it

(*footnote continues*)

To adopt contribution as a rule of obvious fairness designed to achieve "more equal distribution of justice," *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc., supra,* 417 U.S. at 111, the Court need only ascertain that contribution would not conflict with the policies of the federal employment discrimination laws. *See* EEOC brief below (Reply App. 5a-6a). *See generally* Note, *Toward a Workable Rule of Contribution in the Federal Courts,* 65 Colum. L. Rev. 123, 134, 137 (1965). As we discuss below, Northwest's claim satisfies that test.[14]

(*footnote continued*)

gives rise to too many difficult questions. Contribution emerged in about one-fourth of the states by judicial decision without the need for legislation. Courts often are required to resolve remedial issues similar to those presented by contribution, and do not decline to adjudicate questions simply because the decision may prompt additional questions. *See, e.g., Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288 (1972) (comparative fault).

Indeed, the federal courts that have adopted contribution in various contexts—including claims under the employment discrimination laws—have successfully dealt with many of the subsidiary issues characterized by *amici* as beyond judicial competence, including determination of the effect of a settlement. *See, e.g., Gomes v. Brodhurst,* 394 F.2d 465 (3d Cir. 1968).

[14] The willingness to recognize contribution has animated the lower federal courts in other contexts as well as this one. The adoption of contribution in Federal securities contribution cases cannot simply be dismissed by noting that the securities laws contain *some* express contribution provisions. As the EEOC pointed out in its brief in the court of appeals (at 24 n.10), "the decisions involving the right of contribution for implied causes of action under the Securities Acts rest ultimately upon remedial policy considerations." *See, e.g., Gould v. American-Hawaiian Steamship Co.*, 387 F. Supp. 163 (D. Del. 1974), *vacated on other grounds,* 535 F.2d 761 (3d Cir. 1976); *Globus, Inc. v. Law Research Service, Inc.*, 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd per curiam,* 442 F.2d 1346 (2d Cir.), *cert. denied,* 404 U.S. 941 (1971).

Conversely, of all the cases cited by ALPA and the government as declining to adopt contribution, only one, *McCain v. Clearview Dodge Sales, Inc.*, 574 F.2d 848 (5th Cir. 1978), appears to do so without qualification, but in an unreasoned *per curiam* opinion. Of the others, *Mataya v. Behm Motors, Inc.*, 409 F. Supp. 65 (E.D. Wisc. 1976), and *Stier v. Park Pontiac, Inc.*, 391 F. Supp. 397 (S.D. W.Va. 1975), rejected contribution only after applying the test that we propose. The courts found that contribution there would be inconsistent with the express provisions of the federal motor vehicle statute in

(*footnote continues*)

C. Federal Question Jurisdiction over Contribution Claim.

ALPA also reasons that the existence of a jurisdictional provision and "jurisdictional prerequisites" in Title VII precludes subject matter jurisdiction over Northwest's claim under 28 U.S.C. § 1331 or any other statute. ALPA Br. 32-36. Those provisions, however, are addressed to parties who assert that they have been victimized by a violation of Title VII and who seek relief directly under that statute. As Northwest explained in its opening brief (at 51-52), as the district court held (Pet. App. 9b), and as the EEOC itself explained in urging the Court below to sustain federal question jurisdiction over Northwest's contribution claim, Northwest is:

> "not asserting that there has been a violation of Title VII with respect to itself, but is instead asserting an

---

(*footnote continued*)

question. *See* EEOC brief below at 25. Similarly, those courts that have denied contribution in antitrust cases have done so because of alleged conflict with statutory policies, not because of a lack of judicial power.

In *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), the Court refused to allow contribution under the Longshoremen's and Harbor Workers' Compensation Act because contribution would have been inconsistent with the Act's express abrogation of any tort liability to employees on the part of stevedore-employers. This Court has recognized the general unfairness of a no-contribution rule and has gone far to confine the *Halcyon* holding in other cases like *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 417-21 (1969), and *Cooper Stevedoring, supra. See Dobbins v. Crain Brothers, Inc.*, 567 F.2d 559, 565 n.10 (3d Cir. 1977).

In the tax cases cited by the government, *DiBenedetto v. United States*, 1975-1 U.S.T.C. ¶9503 (D.R.I. 1974), and *Cohen v. United States*, 1975-1 U.S.T.C. ¶9391 (E.D. Mich. 1975), the courts rejected contribution for penalties imposed under I.R.C. § 6672 because the penalties were imposed for deliberate misconduct, and contribution has traditionally not been available for intentional torts. This was the same limited rationale for the decision in *Carriers Insurance Exchange v. Truck Insurance Exchange*, 310 F.2d 653 (4th Cir. 1962), a case involving the Interstate Commerce Act. These courts, however, did not reject the possibility of contribution in appropriate cases. In fact, the court expressly recognized in *Cohen*, 1975-1 U.S.T.C. at 86,967, that "*Cooper Stevedoring* can be read as permitting federal courts to apply the general rules of contribution unless there are policy considerations mitigating against such application."

> equitable right to be reimbursed for a financial loss it suffers due to the unlawful conduct of the party from whom contribution is sought." Reply App. 6a-7a.[15]

It is well established that "federal question" jurisdiction under § 1331 includes "claims founded upon federal common law as well as those of a statutory origin." *Illinois v. Milwaukee, supra,* 406 U.S. at 100; *see Bell v. Hood,* 327 U.S. 678, 682-83 (1946). Just as in this case, the federal common law claim in *Illinois* was related to an underlying statute, but the Court held, nonetheless, that the plaintiffs were not bound by the procedural or jurisdictional requirements of that statute and could seek extra-statutory remedies under § 1331.[16]

D. Jurisdiction without EEOC Charge against Union.

For similar reasons, the filing of an administrative charge against the unions, normally required before an aggrieved party may sue directly under Title VII, 42 U.S.C. § 2000e-5 (e), (f), is not a prerequisite to assertion of a common law claim for contribution. In its *amicus* brief in the court below, the EEOC recognized that:

> "the charge filing requirement of section 706 of Title VII . . . has no application whatsoever to the distinctly separate claim for contribution in which one wrongdoer asserts an equitable common law right to

---

[15] The EEOC has recently reiterated its understanding that "the question of contribution . . . does not involve the substantive provisions of either Title VII or the Equal Pay Act." EEOC's Memorandum In Support Of Motion For Stay Pending Appeal at 8, filed on November 3, 1980, in *Northwest Airlines, Inc. v. EEOC* (D.C. Cir. No. 80-2342).

[16] 28 U.S.C. § 1337 supplies an alternative basis for federal jurisdiction over contribution claims arising out of Title VII or Equal Pay Act liability. *Cf. Tunstall v. Locomotive Firemen,* 323 U.S. 210 (1944); *Avco Corp. v. Aero Lodge No. 735,* 390 U.S. 557 (1968).

Weinberger v. Salfi, 422 U.S. 749 (1975), involved a claim brought under a statute that *expressly* prohibited the exercise of § 1331 jurisdiction to hear claims arising under that statute. *See* 422 U.S. at 756-57. Title VII, of course, contains no such explicit prohibition against utilization of alternative jurisdictional bases. *Compare Johnson v. Robison,* 415 U.S. 361 (1974).

> reimbursement from another wrongdoer." Reply App. 10a.

It is, therefore, immaterial that a charge may not have been filed with the EEOC against the party from whom contribution is sought.

Many lower courts have recognized and applied this distinction.[17] Indeed, this Court has held that even an employee who claims to have been the victim of discrimination "is not limited to Title VII in his search for relief," but may pursue independently his "other remedies," without filing a Title VII charge. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975). The charge-filing requirement, therefore, cannot govern an employer's right to pursue his discrete common law claim for contribution.[18]

---

[17] *See, e.g., Glus v. G. C. Murphy Co., supra*, 23 F.E.P. Cas. at 88 and n.11; *Grogg v. General Motor Corp.*, 72 F.R.D. 523, 528 (S.D.N.Y. 1976); *McDonald v. General Mills, Inc.*, 387 F. Supp. 24, 37-38 (E.D. Cal. 1974); *Osborne v. McCall Printing Co.*, 4 F.E.P. Cas. 276, 279 (S.D. Ohio 1972).

[18] Although the contribution claim is not a Title VII claim for purposes of the Act's special procedures, even the contrary assumption *arguendo* would not bar this suit. This Court, it is true, has occasionally used the term "jurisdictional" in referring to the charge-filing requirement. *E.g., Electrical Workers Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229, 239-40 (1976); *Alexander v. Gardner-Denver Co., supra*, 415 U.S. at 47. Lower courts, however, have not interpreted this expression to mean that the requirement is jurisdictional in the technical sense of subject-matter jurisdiction. Instead, they have held that the charge-filing requirement is analogous to a statute of limitations, and is subject to "equitable modification." *See, e.g., Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 475 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978); *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 928 (5th Cir. 1975); *Sanchez v. Trans World Airlines, Inc.*, 499 F.2d 1107, 1108 (10th Cir. 1974); *Moore v. Sunbeam Corp.*, 459 F.2d 811, 826-27 (7th Cir. 1972).

Equitable modification would be particularly apt here if the Court were to hold for the first time that a contribution claim depends upon the filing of a charge against the union. There was no reason for Northwest, as an employer, to believe that an administrative charge would be a necessary prerequisite to a contribution claim against the unions. There is no provision anywhere in the statute for an employer to file a charge against a union that the employer believes may be jointly liable with it. Apparently, the Commission has never entertained a charge from an employer. *See* Reply App. 12a & n.30.

IV. CONTRIBUTION EFFECTUATES CONGRESSIONAL INTENT TO MAKE UNIONS LIABLE FOR CAUSING DISCRIMINATION.

A. Congress Did Not Intend to Preclude Contribution for Backpay Liability.

The absence of an express contribution provision in Title VII and the Equal Pay Act may not be viewed, as ALPA suggests (at 16), as a "purposeful decision [by Congress] to bar contribution." There is nothing in the language or legislative history of these statutes to suggest that Congress considered the issue of contribution, much less purposefully decided to preclude this remedy. ALPA's assertion disregards this Court's repeated warnings that "the failure of Congress expressly to consider a [particular] remedy is not inevitably inconsistent with an intent on its part to make such a remedy available." *Transamerica Mortgage Advisors, Inc. v. Lewis, supra,* 444 U.S. at 18. *See also Cannon v. University of Chicago, supra,* 441 U.S. at 694.

As the Court held in *Transamerica,* Congress may be assumed to have left to the courts the definition of "the customary legal incidents" of its substantive action. 444 U.S. at 19. By the time the Eighty-eighth Congress passed the Equal Pay Act and Title VII in 1963 and 1964, contribution had already received widespread acceptance in this country as an equitable principle. *See* App. A to Northwest's opening brief. There is no reason to believe that Congress intended to foreclose the availability of that remedy under either of those statutes.

B. Congress Did Not Intend to Allow Unions to Be Immunized from Backpay Liability.

In the Court below, the EEOC stated firmly:

> "Not only does contribution further the policies evident on the face of Title VII, but it significantly enhances the underlying goals of the statute, as made clear in *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 417-18 (1975)." Reply App. 8a.

Neither the respondent unions nor the government can explain to this Court how virtual immunity from backpay liability will do anything more than gut what the Court in *Albemarle* said was the primary "spur or catalyst" to union compliance: the "reasonably certain prospect of a backpay award." 422 U.S. at 417-18.

The respondents—and now the EEOC—argue that unions should be protected from their share of Title VII liability if they manage to avoid being charged or sued by an employee. This argument promises substantial immunity from the consequences of a union's own discriminatory conduct, because a union possesses the capacity to influence or control an employee's choice of defendant by focusing the employee's grievance solely on the employer.[19] In addition, as the unions themselves point out, unions may act directly to select the employer as the sole defendant by filing an EEOC charge and initiating a suit. Unless a contribution claim is possible, this kind of "preemptive strike" would allow unions to pardon themselves for their own complicity, no matter how egregious. The unions' argument against contribution, therefore, is basically:

> "a claim for special treatment for unions and special immunity for the discriminatory practices in which they engage. This claim has no support in equity or law." *EEOC v. Steamfitters Local 638,* 542 F.2d 579, 585 (2d Cir. 1976), *cert. denied,* 430 U.S. 911 (1977).

---

[19] The very basis for the development of the law of contribution was the inherent unfairness in allowing ultimate allocation of liability to depend on "the caprice or whim of the plaintiff, or his deliberate intention to fasten liability on one defendant alone." *Knell v. Feltman,* 174 F.2d 662, 665 (D.C. Cir. 1949). Yet that is exactly the result desired by the unions.

ALPA suggests that, to the extent a union colludes with an employee in suing an employer, a court can adjust the employer's backpay liability to take into account "unclean hands." But this possibility is illusory, since full backpay against the employer will have to be awarded except in exceptional circumstances, *see Albemarle Paper Co. v. Moody, supra.* Moreover, ALPA's approach penalizes employees without imposing any sanction on the offending union.

Such a claim, in fact, contradicts the express congressional intent that unions share liability with employers and be treated equally with them.

Nothing has happened in the sixteen years since Congress made this decision that would justify judicial creation of immunity for the entire labor movement from the "spur or catalyst" designed by Congress. Despite the glowing picture of altruistic union initiatives painted by ALPA and by the union *amici*, TWU candidly confesses to an attitude that is hardly unique among unions and their members today. TWU admits to this Court that it feels no obligation to attempt to eliminate discriminatory treatment:

> "Union officers must be democratically elected under the LMRDA and responsive to the desires of the membership. They may not wish to pay dues to enforce Title VII rights." TWU Br. 18-19; *see also id.* 17, 27.

By deciding that unions should face real backpay exposure, Congress has already made the judgment about how best to deter the attitude of indifference—or worse—illustrated by TWU's comments. Arguments that implementing this liability through a contribution remedy would undermine deterrence, therefore, fly in the face of the balance already crafted by Congress. Without contribution, the "spur or catalyst" that Congress intended to apply to unions becomes a chimera.[20]

---

[20] Attempts to drag into this case the debate about whether contribution in the antitrust context is a greater deterrent than a no-contribution rule (*see* U.S. Br. 24-25) overlook a fundamental distinction. An antitrust violator has no way of predicting whether he will be singled out for suit. Since he has an equal chance of being targeted, his prospect of full treble-damage exposure operates as a deterrent. By contrast, if there can be no contribution under the employment discrimination laws, unions have a unique basis—not shared by potential defendants in other contexts—to expect that they may influence the direction of an employee's grievance so as to avoid liability altogether.

Moreover, as the unions themselves point out, labor negotiations, unlike antitrust conspiracies, exist in the context of a duty to reach an agreement (TWU Br. 13-15). Because of the exigencies created by this circumstance,

(*footnote continues*)

As the district court found (Pet. App. 16b) and as the EEOC argued below (Reply App. 8a-9a), therefore, there can be no serious question that the remedy of contribution protects the vitality of the deterrent designed by Congress. In a similar setting, this Court has rejected a rule laying the complete financial burden at the employer's feet because it would provide "slight deterrence, indeed, to future union misconduct." *Vaca v. Sipes, supra,* 386 U.S. at 187.

C. Contribution Does Not Conflict with the Remedial Scheme of Title VII.

1. **Title VII administrative procedures.** A claim for contribution, in the words of the EEOC, is not a claim of a "person aggrieved" by a Title VII violation but is instead "distinctly separate from, and involves different rights than, a cause of action under Title VII" (Reply App. 10a). *See* pp. 11-12 *supra.* Therefore, as the EEOC said below and as the lower courts have recognized, the procedural requirements of Title VII are "simply inapplicable to such a claim." (Reply App. 7a).[21]

Non-Title VII claims deriving from conduct that is also unlawful under Title VII may be asserted without regard to the procedural requirements of Title VII. *See Johnson v. Railway Express Agency, Inc., supra; Alexander v. Gardner- Denver Co.,* 415 U.S. 36, 48 (1974) ("Title VII was designed to supplement, rather than supplant, existing laws and institutions"); 118

(*footnote continued*)

one party may be pressured into accepting a discriminatory contract provision that it otherwise would eschew. According to the complaint in this case (JA 17-18 ¶6), TWU and ALPA regularly demanded continuation of the differential that was held discriminatory in *Laffey*. Thus, unlike freely formed antitrust conspiracies, a discriminatory contract grows out of a compulsory relationship. In the absence of contribution, the party least likely to be sued—the union—will face little deterrent against pressing for illicit advantage.

[21] *See e.g., Jones v. Schramm,* 436 F.2d 899, 900-01 (D.C. Cir. 1970); *Newport Air Park, Inc. v. United States,* 419 F.2d 342, 346 (1st Cir. 1969); *see also Dawson v. Contractors Transport Corp.,* 467 F.2d 727, 732 (D.C. Cir. 1972).

Cong. Rec. 3962 (1972) (remarks of Sen. Javits); Reply App. 9a-10a.[22] Thus, there is no inconsistency between the remedial scheme of Title VII and the assertion of a federal common law claim for contribution for Title VII backpay liability.

2. **Conciliation.** Some of the briefs in opposition to Northwest's claim argue that a union that was not named in an EEOC charge cannot be a defendant in a subsequent contribution suit because it will not have been afforded an opportunity to engage in EEOC conciliation prior to suit. That argument overstates both the availability and the importance of conciliation to a party named in a charge.

Northwest itself did not even learn that an EEOC charge had been filed against it until it was served with the complaint initiating the *Laffey* case. The EEOC acknowledged below that the *Laffey* plaintiffs filed their suit against Northwest "before attempts by the Commission to conciliate the charges ...." (Reply App. 1a). As a result, even if TWU had been named in the charges filed with the Commission, the union would have had no more opportunity to engage in conciliation than Northwest had. The absence of such an "opportunity" for administrative conciliation is no more a legal bar to the unions' liability for contribution than it was a bar to the award of millions of dollars of backpay against Northwest.[23]

---

[22] *See also* 118 Cong. Rec. 3372-73, 3965 (1972)(rejecting an amendment that would have limited available remedies for discrimination to those expressly provided in Title VII). *Compare Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366 (1979), where the Court held that a claim actionable only by virtue of Title VII could be asserted only through Title VII's procedures.

[23] It was not until the 1972 amendments to Title VII, Pub. L. No. 92-261, 86 Stat. 103, that the Commission became subject to the statutory obligation to serve the charge on the respondent within 10 days. As Chair Norton has admitted, the EEOC practice at the time the *Laffey* plaintiffs filed their charges against Northwest was not to serve the respondent until the EEOC completed its investigation. *See Oversight Hearing on Equal Employment Opportunities Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 21 (1977). Presumably, this explains why Northwest had no notice of the filing of the administrative charges before the *Laffey* plaintiffs demanded and obtained "right to sue" letters and actually initiated their backpay suit. *See* Reply App. 1a.

The "spur or catalyst" that should lead "employers and unions" to seek to eliminate discrimination is the reasonably certain prospect of a backpay award. *Albemarle Paper Co. v. Moody, supra,* 422 U.S. at 417-18. The conciliation mechanism was not "intended to serve as a stumbling block to the accomplishment of the statutory objective." *Miller v. International Paper Co.,* 408 F.2d 283, 290 (5th Cir. 1969). The argument made by the unions would subordinate the Act's primary objective of stopping discrimination through the threat of a backpay award to the alleged "right to be cajoled and importuned" during conciliation. *Id.* That argument exalts procedure over substance.

Moreover, an employer seeking contribution cannot be fairly taxed with the consequences of a union's exclusion from the conciliation process. Congress expressly placed on the EEOC the responsibility to investigate and attempt conciliation; that burden does not rest with a charged party. *See* 42 U.S.C. § 2000e-5(b), (f)(1). This duty includes the responsibility "to identify" all parties "legally responsible and necessary for meaningful relief." *Trent v. Allegheny Airlines, Inc.* 431 F. Supp. 345, 350 (W.D. Pa. 1977), *dismissed after trial on other grounds,* 471 F. Supp. 488 (W.D. Pa. 1979). *Cf. Tipler v. E.I. duPont de Nemours & Co.,* 443 F.2d 125, 129 (6th Cir. 1971).

If the Commission had fulfilled its statutory duty to investigate and attempt conciliation in the *Laffey* case, the incumbent union would have been brought into any conciliation efforts. As the government assures the Court, the "EEOC involves a union in conciliation as a matter of course when it appears from the face of a charge that a collective bargaining agreement is involved." (U.S. Br. 29 n.26). *See* Section 62.7(c) of the *EEOC Compliance Manual* (CCH) (1979) (quoted *infra,* Reply App. 11a n.26). Differentials paid by a unionized employer are, of course, necessarily embodied in collective bargaining agreements. Thus, any conciliation initiated by the EEOC in a case like this one would give the union as much opportunity as the charged employer to resolve the dispute informally.

Courts have often recognized that the EEOC's failure to conciliate does not constitute legal prejudice to a private party and does not block a claim for backpay.[24] The failure to name a discriminatory union would not "impede the ability of the Commission to effect voluntary compliance," *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466-67 (5th Cir. 1970). There is, therefore, no reason to bar an employer's claim for contribution simply because the union did not have an opportunity to conciliate, an opportunity that history shows is at best a highly speculative benefit.[25]

3. **Prompt assertion of claims.** Contribution does not conflict with Title VII's policy of avoiding stale claims. If the union itself is named in the charge or sued by the original plaintiff, there can be no argument about interference with Title VII's policy of prompt resolution. When contribution is asserted in a subsequent lawsuit, the claim assumes that the employee's original grievance under Title VII was timely asserted. Even if the union was not named in the original

---

[24] *See e.g., Russell v. American Tobacco Co.*, 528 F.2d 357, 365 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976); *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357, 361 (7th Cir. 1968).

[25] As a practical matter, as this case illustrates, a theoretical "opportunity" for conciliation does not rise to the level of importance that respondents and the *amici* would have the Court believe. The Commission has used conciliation very infrequently in the past, and has been successful with it even more infrequently. For example, in fiscal 1970—the year when the charges against Northwest were filed —of 14,129 new charges received, the Commission attempted to conciliate only 515. Equal Employment Opportunity Commission, *5th Annual Report, Appendix: Detailed Statistics on Charges*, at 63-64 (1971). Similarly, of the 623 conciliations completed by the Commission in fiscal 1970 (including both new charges filed and charges left over from previous years), only 353 were termed "successful" by the Commission. *Id.* at 64. Thus, concrete experience shows that the unions—and Northwest—would have had only the slimmest chance of resolving the *Laffey* charges through conciliation.

The present EEOC Chair recently admitted that the Commission's approach "made it difficult to achieve conciliation and early settlement, even when the parties were predisposed." *Hearings on the Equal Employment Opportunity Commission Before a Subcomm. of the Senate Comm. on Appropriations*, 96th Cong., 2d Sess. 625 (1980) (statement of Eleanor Holmes Norton).

charge, the union will, in the typical instance, have known about the charge filed against the employer and will have had an opportunity to participate in any conciliation proceedings.

The unions' contention here is nothing more than a challenge to the traditional rule allowing assertion of contribution claims after adjudication of the underlying complaint. Nothing in Title VII bars the prompt assertion of a contribution claim after an employee has convinced a district court, following a timely EEOC charge, that the employee was the victim of a discriminatory wage scale. *See* Northwest's opening brief at 45-50.

D. Effective Allocation of Liability Will Not Retard Enforcement.

A principal thrust of the briefs filed by the unions and the government is that unions must be offered immunity from the reasonably certain prospect of liability if they are to take seriously their independent statutory obligation under Title VII and the Equal Pay Act to combat employment discrimination. This argument is nothing short of brazen.

1. **Union enforcement.** Several union *amici* suggest that unions are moving on all fronts to root out discrimination and that exposure to contribution will only discourage this effort. Unfortunately, however, as Commissioner Smith pointed out in dissenting from the EEOC's new stance, "the majority of unions have not been in the vanguard in fighting discrimination." (Reply App. 5b). In *United Steelworkers v. Weber,* 443 U.S. 193, 198 n.1 (1979), this Court remarked that findings of union-caused discrimination "are so numerous" as to make this pattern "a proper subject for judicial notice." It remains true today, as it did when the Equal Pay Act and Title VII were enacted (*see* Northwest opening Br. at 17-20, 24-25, 36-37), that many unions continue to discriminate against minorities and women.[26]

---

[26] Unions "still maintain discriminatory practices that have an adverse effect on the employment opportunities of minorities and women." U.S. Civil Rights Com'm. *The Challenge Ahead: Report on Equal Opportunity in Referral Unions,* i, 3, 5-16, 57-58 (May 1976).

(*footnote continues*)

The fact that *some* unions do not discriminate or may actively seek to combat discrimination does not justify the creation of blanket immunity from contribution, a result that would significantly reduce the prospect of backpay liability for *all* unions. To the extent a union does act affirmatively to enforce Title VII, a court may equitably adjust the amount of contribution it must pay.[27] At the same time the prospect of a contribution claim will give the necessary impetus to those unions that do not otherwise take seriously their statutory obligations.

The respondent unions suggest that any union complaints will be stymied by contribution counterclaims interposed only for delay or retaliation. District judges and the Federal Rules of Civil Procedure, however, surely are up to the task of filtering out any such claims against innocent unions. There is no reason for the Court to assume—especially in light of the liberal provision for attorney's fees, 42 U.S.C. § 2000e-5(k)—that unions will be impotent to fend off such hypothetical counter-attacks, except, of course, where the unions have in fact joined in the discrimination.

The recently adopted EEOC policy to encourage voluntary enforcement of Title VII in collective bargaining (U.S. Br. 1a-8a) does not support a no-contribution rule. That policy

---

(*footnote continued*)

As we noted in our opening brief, in 1976, although 22% of union membership was female, women comprised only 8% of unions' governing boards. Br. at 37 n.27. More recent statistics show that this situation has not changed, and may even have worsened. In 1978, 24.2% of union membership was female, but women comprised only 7.2% of governing board membership. U.S. Department of Labor, Bureau of Labor Statistics, *Directory of National Unions and Employee Associations, 1979*, at 63 (September 1980) (Bull. No. 2079). *See also* E. Glassberg, N. Baden & K. Gerstel, *Absent From the Agenda: A Report on the Role of Women in American Unions*, 4, 12 (Coalition of Labor Union Women Center for Education and Research 1980). *See generally* H. Hill, *Black Labor and the American Legal System* (BNA 1977).

[27] *Compare Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974) (liability apportioned 100% to union because union principally responsible for plaintiff's loss), *with Burwell v. Eastern Air Lines, Inc.*, 458 F. Supp. 474 (E.D. Va. 1978) (liability apportioned 100% to employer because union acted in good faith to "whittle away" at discriminatory practices).

expressly turns on a *case-by-case* inquiry into good faith efforts by a specific union *or employer* to end discrimination (U.S. Br. 7a). This approach is certainly not consistent with blanket immunity for unions, both "good" and "bad." *See* Commissioner Smith's dissent (Reply App. 6b). In addition, this policy on its face is inapplicable to unions that have—as alleged in this case—continued to share full responsibility for the discriminatory wage scale. According to the findings in *Laffey*, respondents never objected to the propriety of the stewardess/purser pay differential. 374 F. Supp. at 1390. Permitting a contribution claim against unions in this setting can hardly conflict with an EEOC policy that, by its terms, requires action of "a compelling and aggressive nature" (U.S. Br. 7a) to end the discrimination.

In addition, the government's *amici* brief expressly concedes that the EEOC's new policy concerns only its own "prosecutorial discretion" and "cannot, and should not, immunize . . . unions from Title VII suits brought by private parties." (U.S. Br. 28 n. 24). Thus, whatever the impact of the EEOC's approach toward encouraging voluntary action, the policy poses no obstacle to a contribution claim against unions that at all times "demanded" adherence to a discriminatory wage package.

2. **Employee enforcement.** Neither Title VII nor the Equal Pay Act gives an employee complete discretion to control the ultimate allocation of liability, discretion that would be undermined by contribution. Unions themselves may file charges as "aggrieved parties" regardless of the wishes of the affected employee. This is so even where the employee recognizes that the union has been the prime mover in the discriminatory contract, not the employer. The EEOC too may initiate suits against employers or unions, regardless of the preference of individual employees.

In addition, the unions exaggerate the effect of a potential contribution claim on the willingness of employees to sue employers. Their argument unfairly assumes that aggrieved employees want so much to protect the treasuries of unions that

have conspired to discriminate that they would abandon grievances against the employers involved. Specific provision for union liability in several federal statutes demonstrates that Congress does not share this view of American workers. If an employee is discouraged from suing an employer because a union treasury may also become subject to backpay liability through a contribution claim, that is not the consequence of contribution, but of Congress' decision to make unions liable for their own complicity in employment discrimination.

Moreover, the unions ignore the fact that many victims of employment discrimination are not members of the unions that are responsible for the discriminatory practices. Illustrations of this fact are job applicants excluded by union-caused or union-assisted practices, former employees who bring an action against a union controlled by current employees (*see ALSSA v. American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974)), or employees suing an ousted union. In situations like these, the possibility that the employer may have a contribution claim against the union will not cause an employee to hesitate in challenging a discriminatory practice.

3. **Settlements.** Far from impeding settlements, a right of contribution will, as Judge Higginbotham concluded, "serve the Title VII policy of favoring ... settlement ...." *Glus v. G.C. Murphy Co., supra*, 23 F.E.P. Cas. at 92. As *Glus* illustrates, an employer may be more inclined to settle with employee-plaintiffs if it has a right to pursue a contribution claim against a union. The federal and state courts have encountered no difficulty adjusting contribution claims where one of the parties has settled the underlying claim. The familiar rules used by the courts in this situation reduce the non-settling party's exposure either *pro rata* on the basis of the total number of parties, or proportionately on the basis of relative fault. *See Gomes v. Brodhurst*, 394 F.2d 465, 469 (3d Cir. 1968).[28]

---

[28] These adjustments will not encourage plaintiffs to go to trial against all defendants in order to "assure themselves full recovery," as the government suggests (U.S. Br. 30). This assertion ignores the basic rationale of settlement: the tradeoff between certain recovery of an acceptable amount now, and only the potential recovery of a possibly greater amount later.

Although the respondent unions and the government creatively spin out theoretical settlement problems, no one has suggested that contribution has actually discouraged settlement in the many contexts in which it is already the rule. Nor have they explained why contribution will have that effect uniquely in employment discrimination cases.

V. CONTRIBUTION IS ALSO WARRANTED FOR EQUAL PAY ACT LIABILITY.

A. Contribution Rests on Congressional Intent to Use Union Financial Liability under the Act as a Deterrent To Wage Discrimination.

The government notes in its *amici* brief that "[t]here is much to suggest that Congress intended that unions would be covered by the Equal Pay Act and held accountable under it in the same manner and to the same extent as employers." (U.S. Br. 17). In support of a contrary conclusion, respondents and the government offer *only* the fact that the Equal Pay Act was, at the last minute, tacked onto the Fair Labor Standards Act rather than left as a free-standing bill. But the government further concedes:

> "[N]othing in the legislative history of the Equal Pay Act reflects any awareness on the part of Congress of the tension between the expressed desire to hold unions accountable and the Act's adoption of the enforcement scheme embodied in the Fair Labor Standards Act." U.S. Br. 19.

In light of this unavoidable concession, can anyone really believe that Congress suddenly and silently renounced its explicit goal, manifested during two years of consideration, to make unions equally liable for the pay lost because of wage discrimination caused by unions?

Nor is there any force to the argument that contribution would conflict with the purpose of the Act by allowing an employer to reap an unfair advantage over business competitors. The Equal Pay Act was not intended to be a fair trade statute. The Act's "fundamental purpose" is the "same" as that

of Title VII, to combat "discrimination based on sex." *Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 266 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970). *See Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974). The remedy provided in the Equal Pay Act is the same as the remedy under Title VII, backpay. Recognizing that discrimination is not solely caused by employers, Congress found it imperative to include unions in the coverage of the Act if the statute was to accomplish its purpose. The express coverage of unions forecloses any argument that an "unfair competition" rationale for the Act precludes either direct union liability or an equitable claim for contribution.[29]

The fact that the Equal Pay Act also provides for liquidated damages does not change the purpose of the Act or the nature of its remedy. The liquidated damage provision is not intended to be punitive or to be a special deterrent to unfair competition. In *Overnight Motor Co. v. Missel*, 316 U.S. 572, 583-84 (1942), and *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707-08 (1945), the Court explained that liquidated damages under the FLSA are *purely* compensatory and adjust for the intangible losses that a worker suffers from the deprivation of statutory pay. There is absolutely no support in case law or the legislative history for the government's suggestion that Congress may have intended that liquidated damages regulate levels of fair competition or deter violations (U.S. Br. 19).[30]

As this case illustrates, an Equal Pay Act violation need not involve any unfair advantage over competitors. The wage

---

[29] While the government emphasizes that an employer's liability under the Equal Pay Act results in the employer's being "reduced to competitive parity and forced to disgorge unfair profits" (U.S. Br. 19), the same result occurs when backpay is awarded under Title VII. No one is so crass as to suggest that a major purpose of Title VII was to eliminate unfair corporate competition.

[30] On the contrary, the 1962 equal pay bill contained a provision which clearly assessed liquidated damages against both employers and unions. H.R. 11677, 87th Cong. 2d Sess. § 6(d) (as passed by the House, July 25, 1962) (108 Cong. Rec. H13809 (daily ed.)). Furthermore, any argument about whether unions themselves are liable for liquidated damages, either directly or through a contribution claim, is irrelevant here. The district court in *Laffey* has not awarded liquidated damages against Northwest.

differential found discriminatory in *Laffey* gave Northwest no advantage over its competitors, since the wages paid to Northwest stewardesses were approximately the same as those paid to cabin attendants on competing airlines. *See* n.3, *supra*. In a case in which an employer did gain some special advantage from a contractually established discriminatory wage scale, the trial judge might take that fact into account in equitably allocating contribution shares. The possibility of competitive advantage to some employers, however, is not a basis for immunizing all unions from Equal Pay Act liability, either in a suit by employees themselves or in an employer's claim for contribution.

B. Contribution for Equal Pay Act Backpay May Be Predicated on Union Liability under a Different Theory.

Contribution is permissible here even if the *Laffey* plaintiffs could not have sued TWU or ALPA under the Equal Pay Act. The unions' incurring of potential backpay liability by violating Title VII or their duty of fair representation exposes them to contribution once a court has invoked the Equal Pay Act to assess the employer for the *same* wage discrimination. The government acknowledges the general principle of contribution "that common liability need not arise out of a single statute or common law tort theory" (U.S. Br. 16 n.15).[31] The government nonetheless asserts that contribution would be "inappropriate" in the context of the sex discrimination laws. The rationale for this position is that it would "provide a means of invoking Title VII while circumventing its policy in favor of conciliation and voluntary resolution of disputes." *Id.* As we have already discussed, however, Title VII procedures are

---

[31] Several cases have recognized the propriety of basing an employer's claim for contribution on the common liability of a union as a joint tortfeasor. *E.g., Lynch v. Sperry Rand Corp.*, 62 F.R.D. 78, 90 (S.D.N.Y. 1973); *Gilbert v. General Electric Co.*, 59 F.R.D. 267, 269-71 (E.D. Va. 1973); *Blanton v. Southern Bell Tel. & Tel. Co.*, 49 F.R.D. 162, 163-64 (N.D. Ga. 1970).

ALPA is wrong in asserting that Northwest did not raise below the argument that contribution may be premised on a union's liability for breach of its duty of fair representation. *See* Brief of Plaintiff-Appellee at 21-22, and Reply Brief at 6 n.* filed in the court of appeals.

inapplicable to a separate contribution claim. *See Johnson v. Railway Express Agency, Inc., supra,* 421 U.S. at 454.

Furthermore, even if the absence of an EEOC charge precluded an employee from suing a union directly under Title VII, the employee would have an independent claim under the federal common law duty of fair representation. Although this duty does not apply to employers, it lays the foundation for a contribution claim because contribution only requires common liability for the same injury, not common liability under the same cause of action. *See Vaca v. Sipes, supra.*[32] Where the common liability of the union rests on its breach of its duty of fair representation, contribution would be particularly appropriate since it would help enforce the policies of the federal labor statutes, as well as Title VII and the Equal Pay Act.

* * * *

Accordingly, as EEOC Commissioner Smith said in urging recognition of contribution under both Title VII and the Equal Pay Act (Reply App. 6b):

> "Simple justice demands, the principles of equity cry out, and the badges of history urge that no party to a collective bargaining agreement which violates the law should be placed in a preferred status . . . in connection with the contribution issue."

---

[32]*E.g.*, in *Communications Workers v. Illinois Bell Tel. Co.*, 12 E.P.D. ¶11,275, at 5907 (N.D. Ill. 1973), the court recognized that a claim for contribution by an employer held liable under Title VII could be based on a union's liability for breach of its duty of fair representation. *See also Farmer v. Hotel Workers Local 1064*, 19 E.P.D. ¶9075, at 6633 , 99 L.R.R.M. 2166, 2187 (E.D. Mich. 1979); *Stevenson v. International Paper Co.*, 432 F. Supp. 390, 408 (W.D. La. 1977), sustaining the validity of this theory of contribution.

CONCLUSION

The Court should direct affirmance of the district court's refusal to dismiss Northwest's claim concerning Title VII backpay and should order reinstatement of the Equal Pay Act claim.

Respectfully submitted.

PHILIP A. LACOVARA
Attorney for Petitioner
Northwest Airlines, Inc.

Of Counsel:

Gerald Goldman
David W. Spears
William R. Stein
Marcy J. K. Tiffany

November 1980.

REPLY APPENDIX A

EXCERPTS FROM BRIEF AS *AMICUS CURIAE* FILED BY EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN THIS CASE IN COURT BELOW ON JUNE 23, 1978 (*NORTHWEST AIRLINES, INC.* v. *TRANSPORT WORKERS UNION*, D.C. CIR. NOS. 78-1056, etc.)*

STATEMENT OF INTEREST [p. 1]

The Equal Employment Opportunity Commission ("EEOC" or "Commission") is the agency established by Congress to administer, interpret and enforce Title VII of the Civil Rights Act of 1964 ****. This case presents questions concerning an employer's right to contribution from labor [p. 2] organizations for back pay liability arising under Title VII, the resolution of which may significantly affect the administration and enforcement of the Act. The EEOC is filing this brief pursuant to the Court's order of January 10, 1978, inviting it to participate in this case.

* * * *

The discriminatory salary differentials found unlawful in [p. 4] *Laffey* were a part of the collective bargaining agreements entered into from 1946 to 1972 between Northwest and the cabin attendants' successive unions. (App. 9). However, only Northwest was named in the charges, filed with the EEOC in March 1970, which formed the basis of the *Laffey* suit. On July 14, 1970, before attempts by the Commission to conciliate the charges, the *Laffey* plaintiffs obtained from the Commission a notice of right to sue, and, one day later, on July 15, 1970, they [p. 5] filed suit against Northwest. 366 F.Supp. at 775. (App. 4).

* * * *

---

* The *amicus curiae* brief filed by the Equal Employment Opportunity Commission in this case in the court of appeals is contained in the Record that has been transmitted to this Court.

SUMMARY OF ARGUMENT [p. 9]

1. The district court in this case held that there was a federal common law right to contribution for liability under Title VII against a person who was not named in an EEOC charge. In doing so, the court relied upon the consideration that recognizing such a right of contribution would serve the substantive and remedial policies of Title VII. Furthermore, the court held that it was appropriate to recognize such a right at federal common law since nothing in Title VII manifested an intent to preclude such a claim. The court applied the proper standard both in holding that it was appropriate to recognize a right of contribution for violations of the Title, and in holding that it was appropriate to recognize such a right at federal common law under 28 U.S.C. §1331.

* * * *

2. Recognizing a right to contribution for Title VII liability [p. 12] against a person who was not named in an EEOC charge is fully consistent with the substantive and remedial policies of the statute. The express terms of the Title manifest an intention to impose monetary liability on those persons responsible for violating its provisions, and specifically to hold labor unions responsible for their violations. Section 703 expressly prohibits unions from engaging in any discrimination proscribed by the Title, or from causing an employer to do so. Section 706(g) states that a party responsible for a violation should be liable for back pay, and that labor unions should bear such liability when they are responsible for the violation.

Furthermore, as the district court properly perceived, recognizing a right to contribution advances the primary purpose of Title VII. For, as the Supreme Court held in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), the primary objective of Title VII—encouraging voluntary compliance with the law—is best served by insuring that all persons who may violate the Act are reasonably certain to be subject to monetary liability as a result. Permitting a party to assert a contribution

claim against another who has violated the Title, where that [p. 13]
person was not named in a charge through inadvertance or design, manifestly serves the primary, prophylactic purpose of Title VII. Accordingly, it is not surprising that most courts to rule upon the question have held that there is a right to contribution for Title VII liability.

3. Recognizing such a right to contribution is perfectly consistent with the intent of Congress in enacting the statutory scheme of Title VII. The legislative history of the Title establishes that the Act was not intended to preclude other claims arising out of the same conduct proscribed by the Title. * * * The case law also makes it perfectly clear that Title VII does not supplant other rights arising out of the same conduct. [Citations omitted.]

It cannot be inferred that claims for contribution constitute [p.14]
an exception to this policy, because there is no necessary inconsistency between the statutory scheme of Title VII and the assertion of a right to contribution for Title VII liability. This is because an employer seeking contribution is not asserting that it has been injured by conduct unlawful under the statute, but rather it is asserting an equitable claim to reimbursement, enforced at common law, from another wrongdoer who shares common liability. [Citation omitted.]

In short, a claim for contribution is not a Title VII claim. [Citation omitted.] Therefore, the charge-filing requirement of section 706 simply has no application to contribution claims.

* * * *

ARGUMENT [p. 19]

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 DOES NOT PRECLUDE A FEDERAL COMMON LAW RIGHT TO CONTRIBUTION BY A PARTY HELD LIABLE UNDER THE TITLE AGAINST A PERSON WHO WAS NOT THE SUBJECT OF A TITLE VII CHARGE.

A. Standards for Resolving the Issue.

Northwest asserts that it may maintain an action for contribution against the unions because, it alleges, they were jointly responsible for the violations of Title VII for which Northwest has been held liable and, for that reason, they are jointly liable under the Title. There is no question that Title VII creates joint liability where several parties are responsible for the same violation. [Citations omitted.]

* * * *

* * * All that is required for the existence of such a right is [p. 20] that the injured party (the original plaintiff) could initially have proceeded against the party from whom contribution is sought [p. 21] as well as the defendant against whom it chose to proceed. *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 113 (1974); *Keleket X-Ray Corp.* v. *United States*, 107 U.S. App. D.C. 138, 275 F.2d 167, 169 (1960); [citation omitted].

* * * *

The defendant unions contend, essentially, that Northwest cannot sue them for contribution because the plaintiffs in *Laffey* could not have done so, since the *Laffey* plaintiffs did not name them in an EEOC charge, as required by section 706(f)(1) of Title VII. The unions do not dispute that the *Laffey* plaintiffs could have named them in EEOC charges. Such an argument [p. 22] would be untenable, since Title VII prohibits labor organizations from in any way discriminating against individuals on the basis of, *inter alia*, sex, and also from causing employers to do so. [Footnotes omitted.]

* * * *

1. **A right to contribution for violation of a federal statute may be recognized where to do so is consistent with the substantive and remedial purposes of the statute involved.** [p. 23]

* * * *

Thus, under the relevant authority, it seems clear that the issue of whether or not it is appropriate to recognize a right of contribution for a violation of Title VII should be resolved by reference to the substantive and remedial polices of the Title. As indicated, the district court in this case concluded that recognizing such a right would serve the policies of Title VII. (App. 45-47). As set forth below, pp. 39-44, we agree with the district court's assessment.[13] [p. 28]

---

[13] The district court specifically reserved the question of whether Northwest's conduct with respect to the violations in question here constituted the sort of willful violation for which it would be inappropriate to permit contribution (App. 48). We, therefore, will not address that issue.

At one point in appellant ALPA's brief (p. 22 n.*), however, the union appears to be suggesting that Title VII should defeat a right of contribution, stating (apparently in support of that suggestion) that the same sort of intent is required under Title VII as under the antitrust acts. But, as this Court made very clear in *George's Radio Inc.* v. *Capitol Transit Co., supra,* 75 U.S.App.D.C. at 189, 126 F.2d at 221, the kind of violation for which contribution should be denied involves "wilful wrongdoers or those guilty of flagrantly wrongful conduct . . . ." Under Title VII, however, "good intent or absence of discriminatory intent does not redeem employment procedures [with discriminatory consequences]." *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 432 (1971).

ALPA's reliance on the sort of intent required under the antitrust statutes is puzzling. For, as indicated above, p. 26, the intent relevant to whether contribution should be permitted for any violation of that statute is the intent of Congress in enacting the remedial scheme (*i.e.,* whether it is a punitive scheme), rather than the intent of violators subject to the provisions of those statutes.

2. A federal common law right to contribution may be asserted where there is no clear congressional intent to preclude such a cause of action. [p. 29]

* * * *

a. Contribution claims can be maintained at federal common law under 28 U.S.C. § 1331.

* * * *

* * * There is no question that the right to contribution for [p. 30] violations of Title VII asserted by Northwest, involving as it does the policies expressed in the Title, constitutes an area of special federal concern. [Citation and footnote omitted.]

Nor is there any question that, where a federal common law right is asserted, jurisdiction may be based on § 1331.***

Furthermore, as the district court noted, "the modern trend [p. 31] . . . has been to recognize a right to contribution under federal law." (App. 41). ***

* * * *

b. A common law claim will be recognized in an area covered by a federal statute unless the statute manifests a clear intent to preclude such claims. [p. 34]

* * * *

As discussed below, pp. 45-46, in enacting Title VII, [p. 35] Congress manifested an analogous intent not to displace other causes of action which might exist with respect to employment discrimination. Furthermore, no congressional intent to pre- [p. 36] clude the particular cause of action asserted here—a common law right to equitable contribution—can be inferred, since there is no necessary inconsistency between the existence of such a right and the statutory scheme of the Title. For, as discussed below, pp. 47-48, in requesting contribution, a defendant is not asserting that there has been a violation of Title VII with respect to itself, but is instead asserting an equitable right to be

reimbursed for a financial loss it suffers due to the unlawful conduct of the party from whom contribution is sought. Since it is not asserting a violation of the Title, the procedural requirements of Title VII are simply inapplicable to such a claim, rather than inconsistent therewith.[17] Therefore, there is nothing in Title VII that precludes the recognition of a common law right to contribution for violations of the statute.

* * * *

B. A Federal Common Law Right To Contribution For Title VII Liability Is Fully Consistent With The Substantive Policies And Goals Of Title VII. [p. 39]

The express terms of Title VII itself demonstrate a congressional intention that a union be held financially liable where it

---

[17] Thus, in our view, the absence of inconsistency between Title VII and a common law right of contribution arises from the nature of a claim for contribution, and does not depend on whether the party seeking contribution can also file a charge alleging that the party from whom contribution is sought violated Title VII with respect to it. *See* pp. 47-48, 68-74, *infra.*

Although not so stated, appellant ALPA's argument apparently depends on Northwest's inability to file a charge. As stated, ALPA argues: 1)Northwest cannot file a charge under Title VII (ALPA Br., pp. 10-11) and therefore cannot invoke jurisdiction under Title VII (*id.*, pp. 11-12), but 2) Northwest cannot invoke jurisdiction under a different statute because it has not filed a charge under Title VII (*id.*, [p. 37] pp. 17, 19). *See generally* J. Heller, *Catch-22* (Simon and Schuster 1961).

Presumably ALPA is arguing that, since employers cannot invoke Title VII, they cannot invoke the jurisdiction of the courts concerning Title VII liability under other statutes. This argument depends on blurring the distinction between claims asserting violations of Title VII and claims in which Title VII liability is involved. *See* discussion *infra* at pp. 47-48; *Cf. Dawson* v. *Contractors Transport Co., supra,* 151 U.S.App.D.C. at 406, 467 F. 2d at 732.

In any event, as noted below, it is our position that companies can file charges under Title VII in certain circumstances. *See* p. 67 & n.30, *infra.*

shares responsibility with an employer for an unlawful employment practice.[18] The provisions of Section 703 impose liability on a union, not only for its own discrimination, but also for causing employer violations of the statute. Section 703(c)(3) specifically states that it is unlawful for a labor organization "to cause or attempt to cause an employer to discriminate against an individual in violation of this section." 42 U.S.C. §2000e-2(c)(3). Furthermore, section 706(g) of Title VII expressly indicates that the party "responsible" for an unlawful practice should be required to pay damages, and that labor organizations should bear such liability to the extent that they may be responsible for the unlawful practices. Specifically, section 706(g) authorizes a court to order "back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice) . . . ." 42 U.S.C. §2000e-5(g). Thus, sections 703(c)(3) and 706(g) both reflect a statutory policy that monetary relief be borne by a union to the extent that it is responsible for a violation of Title VII. Clearly, a right of contribution promotes that policy. [p. 40]

In addition, the remedial provisions of section 706(g), which authorize, *inter alia*, "any . . . equitable relief" which "the court deems appropriate", demonstrate a congressional intent that all forms of equitable relief regarding Title VII violations be utilized where appropriate. It is consistent with this policy to recognize a claim for contribution, which "sounds in equity" and is based on principles of fairness and justice. *Jones* v. *Schramm, supra*, 141 U.S. App.D.C. 171, 435 F.2d at 901.

Not only does contribution further the policies evident on the face of Title VII, but it significantly enhances the underlying goals of the statute, as made clear in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-18 (1975). *** It is only through a [p. 41]

[18] As discussed above, the case law has long recognized union liability where a union is jointly responsible for a Title VII violation. *See* cases cited *supra* at p. 19.

rule allowing contribution that back pay liability, can be "reasonably certain". For otherwise, liability could often be escaped by those whom victims failed, either by ignorance or design, to name in a charge. As the district court explained, under a rule of contribution "[b]oth union and employer will know that they both must be vigilant to eschew unlawful discrimination and that the employee's predilections as to whom to sue will not insure either immunity from the mandates of the law." (App. 47-48).

* * * *

* * * Recognizing the importance of deterring union discrimination in particular, the Supreme Court fashioned a rule analogous to contribution in *Vaca* v. *Sipes*, 386 U.S. 171, 187-88, 196-97 (1967), requiring that liability be apportioned according to relative responsibility for damages caused by an employer's breach of a collective bargaining agreement and a union's breach of its duty of fair representation. As the Court stated, under a contrary rule, "the employer would be compelled by the court to pay for the union's wrong—slight deterrence, indeed, to future union misconduct. . . ." 386 U.S. at 187. [p. 42] [p. 43]

Thus, there can be little doubt that recognition of a right to contribution will further the enforcement of Title VII. And, indeed, most courts to have considered the question have held that defendant employers in Title VII cases may assert claims for contribution against labor organizations which were not named in an EEOC charge. [Footnote and citations omitted.]

* * * *

C. A Right To Contribution Is Consistent With The Congressional Intent And The Statutory Scheme Of Title VII. [p. 45]

Although Congress in Title VII designed an elaborate system for administratively and, if necessary, judicially resolving complaints of discrimination, both the legislative history

and the case law establish that the statute was not intended to preclude other claims based on the same unlawful conduct. ***

Therefore, it is clear that Congress did not intend that the procedural restrictions of Title VII would cut off separate actions reaching third parties, where such an action serves to eliminate employment discrimination. As discussed *supra*, the existence of a common law right to contribution significantly serves that policy. [p. 46]

The case law, too, establishes that Title VII does not preclude actions asserting rights under other law, even though the actions arise from the same conduct made unlawful under Title VII. [Citations omitted.]

Nor can it be inferred that claims for contribution should constitute an exception to this policy. There is no necessary inconsistency between the statutory scheme of Title VII and a right to contribution against third parties, as the unions imply. This is because a cause of action for contribution is distinctly separate from, and involves different rights than, a cause of action under Title VII. [p. 47]

* * * *

The unions here contend, however, that failure to satisfy the charge-filing requirement of section 706 of Title VII precludes a claim for contribution. But section 706, by its terms, applies only to actions brought by the "person aggrieved" seeking a remedy for Title VII violations. It has no application whatsoever to the distinctly separate claim for contribution in which one wrongdoer asserts an equitable common law right to reimbursement from another wrongdoer. Therefore, nothing in that provision precludes, or conflicts with, the assertion of a claim for contribution by one joint violator of the Title against another. [p. 49]

* * * *

In sum, then, the legislative history of Title VII strongly supports the conclusion that it is entirely appropriate to recognize an independent right to contribution under federal common law for violations of Title VII; to do so does not conflict with the structure of the Title; and the authority cited by the unions simply does not support their contention that Title VII must be held to preclude such a claim. [p. 57]

* * * *

* * * It is also clear that the Commission may attempt to conciliate whenever necessary to obtain voluntary resolution of Title VII disputes from the fact that conciliation is only an "informal" process. *See* Section 706(b), 42 U.S.C. § 2000e-5(b), authorizing the Commission to attempt to eliminate unlawful practices by "informal methods of conference, conciliation, and persuasion." In fact, it is the Commission's standard procedure to conduct conciliation negotiations with a union if resolution of a charge involves changes in a collective bargaining agreement, even though the union has not been named in the charge.[26] [p. 64] [p. 65]

* * * *

There are means, in addition to that provided in section 705(g)(4), by which a person named in a charge can afford an alleged joint violator an opportunity for voluntary resolution through the offices of the EEOC. A party can request that a Commissioner of the EEOC file a charge against a third party [p. 66]

---

[26] Section 62.7(c) of the EEOC Compliance Manual provides:

(c) *Assuring Involvement of Labor Organizations*—Where a Union is a co-respondent or where a change in a collective bargaining agreement is involved, conciliation efforts paralleling those with the company should be conducted with the Union. . . . At a later point, the parties may be brought together if the conciliator believes this will prove beneficial. [Equal Employment Opportunity Commission, *Compliance Procedures for Personnel of the Equal Employment Opportunity Commission* §62.7(c) (1977).]

whom it alleges has violated the statute. *See* Section 706(b), 42 U.S.C. § 2000e-5(b). [Footnote omitted.] In addition, since 1972, it has been possible to file a charge "on behalf of" persons aggrieved by the alleged discrimination. [Footnote omitted.] We also believe that, in certain circumstances, an employer may file a charge alleging that it has been unlawfully [p. 67 aggrieved by a violation of section 703(c)(3) (quoted *supra* at p. 22 n.9).[30]

We do not believe, however, that resort to any of these [p. 68 devices should be required prior to asserting a contribution claim.[31] A request for a Commissioner's charge would serve no function that could not be served as well by a request for conciliation under section 705(g)(4). [Footnote omitted.] A requirement that a company file a charge, either under section 703(c)(3) or on behalf of its employees, in order to assert a contribution claim would produce both conceptual and practical difficulties. Furthermore, each of the significant Title VII policies which might be served by such a requirement can be accommodated by alternative means.

It seems highly unlikely that the circumstances in which contribution would be appropriate would always constitute a

---

[30] While the Commission had not found it necessary to take a position with respect to this issue prior to the Court's request for Commission participation in this case, it adopted the position stated in the text at a Commission meeting on May 30, 1978, when the issue was considered so that the most complete answer possible could be given to the question put in this Court's order of January 10, 1978. At the same meeting the Commission directed that further study be given to the implications of that position in varying circumstances.

* * * *

[31] The Commission has not established regularized procedures, by regulation or otherwise, by which a respondent may join a third party, which is not named in a formal charge of discrimination, as a "co-respondent" in proceedings before the EEOC. As noted above however (p. 65, *supra*), it has been the Commission's standard practice to join the union in conciliation efforts where the practices at issue involve a collective bargaining agreement.

violation of section 703(c)(3).[33] To the extent that the scope of [p. 69]
the right to contribution is not coextensive with the scope of conduct proscribed by that provision, the employer could not properly file a charge on its own behalf. For, as previously indicated, pp. 20, 47-48, in asserting a contribution claim, the employer is asserting only that it has been held solely financially responsible for harm caused by another. Such an allegation does not, in itself, allege a violation of Title VII with respect to the employer.

Certainly it would be anomalous to require an employer to file an "on behalf of" charge—which would have to allege that the same practices, for which it is jointly responsible and might be held liable, have unlawfully injured its employees—as a condition for asserting its right to contribution. It would seem that an employer should be able to defend the legality of its practices without reservation in an administrative process, such as that established by Title VII, which cannot finally determine the company's liability and which is intended to obviate the [p. 70]
need for any litigation concerning liability. Furthermore, such a requirement might entail increasing the risk that the company will itself be held liable. [Footnote omitted.] ***

* * * *

---

[33] Section 703(c)(3) contemplates that a union has caused the employer's violation. However, in some circumstances the joint liability may stem from conduct which cannot be characterized in causal terms, but instead more appropriately is in the nature of a joint venture. *See Johnson* v. *Goodyear Tire & Rubber Co., supra,* 491 F.2d at 1381 (employer and union both participated in discrimination for their own reasons). *Cf. McDonald* v. *Santa Fe Trail Transportation Co.,* 427 U.S. 273, 284-85 (1976)(claim that union "joined in" the alleged discrimination).

CONCLUSION [p. 76]

This Court should hold that there is a right to contribution for financial liability incurred under Title VII. ***

Respectfully submitted,

ABNER W. SIBAL
General Counsel

* * * *

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

* * * *

June 1978

REPLY APPENDIX B

DISSENT OF COMMISSIONER J. CLAY SMITH, JR. RE: VOTE OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ON THE ISSUES OF CONTRIBUTION UNDER TITLE VII AND THE EQUAL PAY ACT ON JULY 1, 1980*

The views of the members of the EEOC were requested on the above captioned issues by the Department of Justice. Justice will represent the interest of the U.S. Government in a matter before the Supreme Court raising the contribution issues.

On July 1, 1980, the General Counsel brought two major issues before the Commission for consideration and approval. In broad terms, the first issue presented was whether as a matter of policy the EEOC opposes the right of an employer to sue a union for contribution where both parties' joint conduct may result in a violation of Title VII. The second issue presented the same question as it relates to violations of the Equal Pay Act. On the first issue the majority voted not to support a policy of contribution (with Commissioners Smith and Walsh dissenting). On the second issue the majority voted not to support a policy of contribution (with Commissioner Smith, alone, dissenting). Because of the importance of these questions, I submit my views for the official minutes for association with my dissents and to be associated with any communications supported by the majority transmitted to the Department of Justice, or elsewhere.

BACKGROUND

Two years ago the Commission approved the General Counsel advancing the position that a party found guilty of violating Title VII had a right to contribution against any other

---

* A copy of this dissenting opinion has been filed as an exhibit in support of plaintiff's motion for summary judgment in a pending suit under the Government in the Sunshine Act 5 U.S.C. §552b. *Northwest Airlines, Inc.* v. *Equal Employment Opportunity Commission et al.* (D.D.C. Civ. No. 80-2192).

party who participated in the wrong-doing. The Commission took this position in an *amicus curiae* brief in *Northwest Airlines, Inc.* v. *Transportation Workers Union of America,* 606 F.2d 1350 (D.C. Cir. 1979). Citing prominent authority, the EEOC's brief stated:

> "[G]eneral principles of justice require that in the case of a common obligation, the discharge of it by one of the obligors without proportionate payment from the other, gives the latter an advantage to which he is not equitably entitled." (Commission brief at p. 20)

Nothing has changed in law or in fact which warrants the Commission reversing this original position. Indeed, our position is stronger now than when the Commission first endorsed the principle of contribution since the only two Courts of Appeals which have considered the issue have both ruled that Title VII defendants have a right to contribution from other parties responsible for the discrimination. See *Northwest Airlines, Inc.* v. *Transportation Workers Union of America,* 606 F.2d 1350 (D.C. Cir. 1979) and *Glus* v. *Murphy,* ____ F.2d ____, (3rd Cir.) (No. 79-1507, 1508), decided June 27, 1980.

Both Courts of Appeals held that contribution furthers the mission of Title VII in eliminating invidious employment discrimination. The Title VII statutory scheme and EEOC implementing regulations were designed with the expectation that if a union jointly participates in an unlawful employment practice it would be held monetarily liable. See EEOC Compliance Manual, Sec. 201.5(b) (Employers as aggrieved persons).

In the *Glus* decision, *supra,* Judge A. Leon Higginbotham pointed out that the very terms of Title VII establish that unions are to be held financially liable with employers for unlawful acts. As his opinion points out, while Section 703(a) of Title VII, 42 U.S.C. 2000e-2(c)(3) holds a union liable not only for discriminatory actions in which it independently engages but also when it "cause[s] or attempt[s] to cause an employer to

discriminate against an individual. . . ." The backpay provision of Title VII, 42 U.S.C. 2000e-5(g) is applicable to unions and employers alike.

Judge Higginbotham opined:

> "These provisions reflect a statutory policy that the responsibility for monetary relief should be borne by both unions and employers to the extent that they are responsible for violations of Title VII. *A right of contribution would achieve this goal.* (emphasis added) In contrast, a holding that there is no right of contribution under Title VII would release some individuals from liability." *Glus* v. *Murphy, supra* at p. 14, slip opinion.

In addition to this language, Judge Higginbotham provided five other independent and important policy considerations supporting the majority opinion of the court which are too persuasive for me to cast my lot with the majority of the Commission on the Title VII issue:

1. *Policy: Joint Elimination of Discrimination.* Quoting *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405, 417-418 (1975), Judge Higginbotham stated,

> It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practice and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominous page in this country's history." *Id.* at 15 (slip opinion).

2. *Policy: Vigilance During Collective Bargaining.* Judge Higginbotham stated,

> Under a rule of contribution "[b]oth union and employer will know that they both must be vigilant to eschew unlawful discrimination and that the employee's predilections as to whom to sue *will not insure either immunity* from the mandates of the law." *Ibid.* (emphasis added)

3. *Policy: Contribution Favors Conciliation.* Judge Higginbotham stated,

> A right of contribution would also serve the Title VII policy of favoring conciliation and settlement of these claims. "[C]ooperation and voluntary compliance . . . [a]re the preferred means for achieving" the goal of equality of employment opportunities. *Ibid.*

4. *Policy: Prevents Unjust Enrichment.* Judge Higginbotham stated,

> Further, the contribution rule prevents a plaintiff from becoming unjustly enriched either by collusive activity with one of the defendants, or by threatening one defendant that the suit will be brought only against it, thereby forcing an unjustified settlement. *Id.* at 16.

5. *Policy: Contribution is Consistent with Congressional Intent.* Judge Higginbotham stated,

> A right of contribution would implement the congressional intent to hold both unions and employers liable for unlawful employment practice and would aid the conciliation and settlement goals of Title VII. *Ibid.*

Historically, the Commission has successfully argued in the Appellate Courts that the backpay provision of Title VII is prophylactic. See *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975). By that I mean backpay is a preventative tool. When an employer or union becomes aware that other institutions are making backpay awards for violations of anti-discrimination statutes, these persons have notice that if they violate the law, they too are reasonably certain to be subject to monetary liability. Under contribution, unions as well as employers recognize that they have to actively work to eliminate discrimination because even if no charge is filed against it, a party to a collective bargaining agreement can still seek contribution from the other for past violations of law. Absent contribution, if a union is not charged because of lack of knowledge, inadvertence or design, the union may enjoy immunity.

The Commission majority reasoned, *inter alia,* that contribution is inconsistent with the fact that some unions may aid the Commission in proving employer violations. Implicit in the majority's argument is the assumption that unions aid charging parties and the Commission in eliminating discrimination. However, as the history of Title VII reveals, the majority of unions have not been in the vanguard in fighting discrimination. See, *United Steelworkers of America* v. *Weber,* 443 U.S. 36 (1979), which tolls against the position taken by the majority. The opening text of the *Weber* opinion (which the EEOC applauded) states: that "blacks [have] long been excluded from craft unions[1] . . . ." Footnote 1 is revealing:

> [1] Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice. See, e.g., *United States* v. *International Union of Elevator Contractors,* 538 F. 2d 1012, (CA3 1976); *Associated General Contractors of Massachusetts* v. *Alshuler,* 490 F.2d 9 (CA1 1973); *Southern Illinois Builders Association* v. *Ogilve,* 471 F.2d 680, (CA7 1972); *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F.2d 159, (CA3 1971); *Local 53 of International Association of Heat & Frost, etc.* v. *Vogler,* 407 F.2d 1047, (CA5 1969); *Buckner* v. *Goodyear,* 339 F.Supp. 1108, (ND, Ala. 1972), aff'd without opinion, 475 F.2d 1287, (CA5 1973). See also, United States Commission on Civil Rights, *The Challenge Ahead: Equal Opportunity in Referral Unions* 58-94 (1976), (summarizing judicial findings of discrimination by craft unions); G. Myrdal, *An American Dilemma* (1944) 1079-1124; R. Marshall and V. Briggs, *The Negro and Apprenticeship* (1967); S. Spero and A. Harris, *The Black Worker* (1931); United States Commission on Civil Rights, Employment 97 (1961). State Advisory Committee, United States Commission on Civil Rights, 50 States Report 209 (1961); Marshall, "The Negro in Southern Unions," in *The Negro and the American Labor*

Movement (ed. Jacobson, Anchor 1968) p. 145; App. 63, 104."

See also, R. C. Weaver, *Negro Labor* (Harcourt, Brace & Co., N.Y., 1946); Norgren, Webster, et al., *Employing The Negro In American Industry* (Industrial Relations Counselors, Inc., N.Y., 1959) (Mono. No. 17); Van Deusen, *The Black Man in White America* (The Associated Pub., Inc. 1938) (with particular reference to Chaps. V and VI).

The fact of the matter is that there are some unions which are good on equal employment opportunity issues and some which are bad. Norgren, Webster, *Employing The Negro In American Industry, supra* at 145; Marshall & Briggs, *The Negro and Apprenticeship,* cited in *United Steelworkers of America* v. *Weber, supra* 35, n.1. Simple justice demands, the principles of equity cry out, and the badges of history urge that no party to a collective bargaining agreement which violates the law should be placed in a preferred status as a matter of administrative discretion, equity or distributive justice in connection with the contribution issue. As applied to unions, that is what both United States Courts of Appeals which have considered the issue have ruled; that was the Commission's and the General Counsel's original position; and that is what makes the most sense in the fair and effective enforcement of Title VII and other anti-discrimination statutes. Any other result impedes justice and rewards the most discriminatory and recalcitrant unions which for one reason or another have not been sued by the charging party. Civil Rights policy considerations weigh heavily in favor of the principle of contribution. Accordingly, I

respectfully dissent from the majority's position to restrict the right.*

/s/ J. Clay Smith, Jr.

J. Clay Smith, Jr.
Commissioner
July 7, 1980

cc: The Commissioners
General Counsel
Executive Secretariat

* Based upon principles of equity, the view expressed above is the reason why I dissented on the contribution issue as it relates to the Equal Pay Act. It is within the general equitable powers of the Federal courts to impose joint and several liability on a union or employer for violation of the Fair Labor Standards Act.

Supreme Court, U.S.
FILED
OCT 31 1980
MICHAEL RODAK, JR., CLERK

No. 79-1056

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NORTHWEST AIRLINES, INC.,
Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,
AND
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

OBJECTION OF PETITIONER NORTHWEST AIRLINES, INC. TO MOTION OF MARY P. LAFFEY *Et Al.* FOR LEAVE TO FILE BRIEF AS *Amici Curiae*

PHILIP A. LACOVARA
GERALD GOLDMAN

HUGHES HUBBARD & REED
1660 L Street, N.W.
Washington, D.C. 20036
(202) 862-7400

Attorneys for Petitioner Northwest Airlines, Inc.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1056

NORTHWEST AIRLINES, INC.,
Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,
AND
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

OBJECTION OF PETITIONER NORTHWEST AIRLINES, INC. TO MOTION OF MARY P. LAFFEY *Et Al.* FOR LEAVE TO FILE BRIEF AS *Amici Curiae*

Petitioner Northwest Airlines, Inc. respectfully submits this memorandum in accordance with Rule 36.3 of the Rules of the Supreme Court to explain why it has objected to the filing of the proposed *amici* brief of Mary P. Laffey *et al.* and why leave to file that brief should be denied. Although petitioner has waived any objections to other *amici* briefs that have been submitted in support of respondents, the *amici* brief of these movants is untimely, irrelevant, and erroneous.

STATEMENT

Movants Mary P. Laffey *et al.* are the named plaintiffs in the Title VII and Equal Pay Act litigation—the so-called "*Laffey*" case[1]— out of which the present contribution action arises. They are not parties to this action, profess to have no interest in the legal issues raised in the contribution suit, and do not move to file an *amici* brief in support of any party. *See* Motion at ¶¶ 2, 4, 6. Instead, movants seek leave to file a brief as *amici curiae* only to make a presentation on the facts of the underlying *Laffey* litigation. Movants themselves, however, acknowledge that determination of the facts found in *Laffey* is "wholly irrelevant to the legal issues before this Court." Motion at ¶ 2.

Although petitioner is fully prepared, if necessary, to meet this presentation on its own terms (*see* pp. 6-10, *infra*), the movants' efforts to precipitate litigation of the facts of a collateral case would be at odds with this Court's Rules and would complicate the just and expeditious resolution of this case. Specifically:

(1) The motion for leave to file is out of time under Rule 36 of the Rules of this Court.

(2) Rule 36 permits the filing of an *amicus* brief addressed to the legal issues in the case, not a highly partisan (and misleading) account, like movants' presentation, of background facts concerning a separate litigation.

(3) In all events, the motion for leave to file should be denied because the proposed *amici* brief serves no legitimate interest of the movants and contributes nothing to the Court's resolution of the issues. On the contrary, the proposed brief simply interjects disputes of fact into the resolution of concededly pure questions of law.

---

[1] *Laffey v. Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C. 1973) and 374 F. Supp. 1382 (D.D.C. 1974), *aff'd in part, vacated in part and remanded*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

ARGUMENT

I. THE MOTION FOR LEAVE TO FILE IS OUT OF TIME.

Rule 36.3 of the Court's Rules provides that a motion for leave to file an *amicus* brief may be made only within the time allowed for filing the petitioner's brief, if the brief, as in this case, is not submitted in support of either party. Since petitioner's brief was due (and filed) on August 29, 1980, the motion here—filed on October 25, 1980—is fatally out of time.

Movants attempt to excuse this violation of the Rules on the ground, that since they purportedly are responding to the statement of facts in petitioner's merits brief, they could not have acted earlier. The argument is both legally unsound and factually untrue. Rule 36.3 on its face makes no provision for any extensions of time, and its deadlines are mandatory. As the Rule states:

> "*No* such motion shall be received unless submitted within the time allowed . . . ." (Emphasis added.)

Moreover, prior to the filing of petitioner's brief on the merits, counsel for movants expressed an interest in filing an *amici* brief to address the facts in *Laffey*. Immediately after petitioner filed its brief, petitioner provided a courtesy copy of its brief to movants' counsel and objected to the propriety of any *amici* brief addressing factual issues in the *Laffey* case. (A copy of that letter, dated September 3, 1980, is annexed as Appendix A.) Not until *seven weeks* later did movants file their four-page motion and proposed nine-page *amici* brief. Thus, even under movants' view that the deadlines of Rule 36.3 can be waived, there would be no warrant for treating their motion as timely in this case.

II. THE PROPOSED BRIEF IS NOT AN *AMICUS* BRIEF THAT THE RULES OF THIS COURT PERMIT TO BE FILED.

Rule 36 makes no provision for third persons, like the movants here, to challenge a party's statement of facts. Rule 36

establishes procedures for the filing of an *amicus* brief, which by definition addresses questions of law through the presentation of authorities, arguments, or relevant "legislative"-type facts. Rule 36 scarcely contemplates that third persons might also advance positions regarding only the facts of the particular case or—as here—of a different case.

The function of an *amicus curiae* is to "advise the Court on the law in order that justice may be attained." *Allen v. County School Board,* 28 F.R.D. 358, 362 n.2 (E.D. Va. 1961). Indeed, Circuit Judge Bailey Aldrich only recently explained:

> "In granting permission [to file an *amicus* brief] we had assumed, wrongly, it proved, that counsel knew what an amicus is, namely, one who . . . 'for the assistance of the court gives information of *some matter of law* in regard to which the court is doubtful or mistaken,' 1 Bouvier's Law Dictionary 188 (3d ed. 1914), *rather than one who gives a highly partisan . . . account of the facts.*"

New England Patriots v. University of Colorado, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979) (emphasis added).

In this case the proposed *amici* brief does nothing more than "give a highly partisan . . . account of the facts." It offers no information whatever regarding any matter of law and, indeed, expressly disclaims any such purpose. Rule 36 does not authorize even the timely filing of such a document.

III. IN ALL EVENTS, THE MOTION FOR LEAVE TO FILE SHOULD BE DENIED.

Even if this Court's Rules countenanced the filing of the proposed *amici* brief, the Court should not permit it:

1. Movants have nothing to contribute to the resolution of the issues in this case. As they themselves put it, they do not "wish to state any view on the legal issues before this Court," but only to correct alleged misstatements of fact in petitioner's

merits brief. Motion at ¶ 2. Yet the facts on which the Court must decide this case are clear and not subject to dispute. They are the allegations in the complaint. As petitioner explained in its opening brief (at 2 n.2), these allegations must be taken as true, since the case comes before the Court on the motions of the respondent unions to dismiss. *See, e.g., Scheuer v. Rhodes,* 416 U.S. 232, 236-37 (1974); *Gardner v. Toilet Goods Assn.,* 387 U.S. 167, 172 (1967); *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957).

2. As petitioner expressly stated in its brief (at 2 n.2), the references to the findings of the district court in the underlying *Laffey* litigation were simply "to provide background." Since, as movants concede, this background "recitation is wholly irrelevant to the legal issues before this Court" (Motion at ¶ 2), it could not conceivably advance consideration of this case to quarrel over the accuracy of petitioner's description of those findings.[2] In any event, the respondents and the Court are fully able, without movants' assistance, to verify petitioner's limited narration of the background. Petitioner did not refer to any obscure evidence in the *Laffey* record, but instead cited only the explicit findings in the district court's opinions in that case as published in the Federal Supplement.

3. Moreover, movants recognize that, even if this Court's opinion were to "mischaracterize" the facts in the *Laffey* litigation, that would hardly "be 'binding' upon movants or upon the lower courts in which aspects of the *Laffey* case are still being litigated." Motion at 2. In these circumstances, movants are reduced to claiming that "a declaration by this Court as to what was 'found' in *Laffey* might weigh heavily with the lower courts and thus influence the further prosecution of

---

[2] It is precisely for this reason that movants were correct in expecting (*see* Motion at ¶ 2) that the respondents did not find it necessary or appropriate to make the points contained in movants' proposed brief.

the *Laffey* case." *Id.* This speculative assertion is hardly a legitimate basis for leave to file a fact-oriented brief as *amici curiae.*

4. Finally, granting the motion for leave to file would be likely to impair the just and expeditious consideration of this case by interjecting into the decision of what movants admit are "pure issues of law" (proposed brief at 2) several questions of fact that petitioner may not even have adequate space to answer in a 20-page reply brief. In their proposed *amici* brief, movants purport to correct a variety of asserted misstatements in petitioner's opening brief, but, as the following discussion illustrates (without being exhaustive), the claimed corrections themselves are highly misleading and would require their own response:

a. Movants attack petitioner for stating that the petitioner's male flight service attendants ("FSA's") received the same rate of pay as female stewardesses, without noting that FSA's had relatively limited service. *See* proposed brief at 5. But movants neglect to state that, while the FSA's played a somewhat limited role, the district court in *Laffey* found that Northwest had recently:

> "hired several male cabin attendants as 'stewards' to perform the same duties as stewardesses and FSA's *and at the same union negotiated and agreed upon rate of pay. At all all times from 1949 to the present, FSA's and stewards have been compensated at the same rate as stewardesses* of equal longevity." 366 F. Supp. at 767 (¶ 21) (emphasis added).

Thus, the point remains that male cabin attendants in significant numbers and for significant periods of time were paid the same wages as stewardesses, but less than male pursers, for performing duties that were similar to those performed by stewardesses but were thought to be less demanding than those of pursers. Even more relevantly, the district court in *Laffey*

found that this pay structure was continuously maintained pursuant to union agreement.

b. In a similar vein, movants attempt to tax petitioner with overreaching in stating that the pay differential was not merely maintained, but "established" through collective bargaining. *See* proposed brief at 5-6. The facts are, according to the *Laffey* findings, that from the first day of collective bargaining over the purser classification beginning in 1949:

> "[a] salary was established for the purser position at a rate higher than that for the stewardess position. The salary for the position has increased over time *pursuant to union negotiation and agreement.*" 366 F. Supp. at 766 (¶ 11) (emphasis added).

c. Next, movants challenge as unsupported by any *Laffey* finding petitioner's depiction of the unions' role in perpetuating the pay differential, focusing particularly on petitioner's statement at page 5 of its brief that:

> "the union demanded continuation of the [purser pay] differential (JA 17-18 ¶6). *See* 366 F. Supp. at 765-66 (¶8), 767-68 (¶23)."

See proposed brief at 6-7. Petitioner, however, properly relied for this statement on the complaint in this case, not on any *Laffey* findings, and the allegation referenced by petitioner (JA 17-18 at ¶ 6) does in fact state "that there were differentials in salary . . . between NWA's Pursers and Cabin Attendants *as demanded by* the respective union, when incumbent. . . ." (Emphasis added.)

Moreover, while that allegation must at this point be accepted as true without further support, the petitioner's additional background reference to the *Laffey* findings explains that the union in fact "opposed" a proposal by petitioner to eliminate the pay differential altogether. Movants' contrary suggestion that the unions pressed for elimination of the

differential is simply false. Indeed, the *Laffey* court expressly found "[w]hile this Court has found as fact that the jobs of purser and stewardess are in fact equal, it was not unreasonable for the Company to have believed otherwise." The reasonableness of that belief rested in part, according to the court, on:

> "*the acquiescence of the stewardesses' bargaining representative in this arrangement* [and] the absence of any grievances or even suggestions from stewardesses to the contrary prior to the present controversy. . . ." 374 F. Supp. at 1390 (emphasis added).

Movants also claim that there is "no evidence in the *Laffey* record, and no finding, that the union, either separately or together with Northwest, ever addressed the issue whether a pay differential between pursers and stewardesses was justified by any differences in duties or responsibilities . . . ." (proposed brief at 6). Here the gratuitous comments of the would-be *amici* collide with the explicit acknowledgement by respondent Transport Workers Union in its brief in this Court that, at the time, both

> "it and NWA believed that the differential was still warranted by the duties and responsibilities of the purser and stewardess positions . . . ." (p. 26)

d. Movants similarly err in attacking petitioner's statement that the purser pay differential reflected extra duties and supervisory responsibilities that the pursers were believed to perform. *See* proposed brief at 7. As acknowledged by the respondent Transport Workers Union brief, the *Laffey* findings were to the effect that pursers were charged with different responsibilities than were other cabin attendants, 366 F. Supp. at 783-86 (¶¶ 61-63, 66-69), but that these differences were legally insufficient to justify the pay differential. *See* 366 F. Supp. at 785, 786 (¶¶ 64, 69).

e. As a last illustration, we note movants challenge to petitioner's statement (at 4) that the *Laffey* court "expressly found that Northwest had reasonable grounds for its belief that the purser position was not equal to the other cabin attendant jobs." *See* proposed brief at 8. Movants say that the "passage" on which petitioner relied in making that statement was "reversed" by the court of appeals in *Laffey* and that the district court found that "Northwest was motivated by sex in paying stewardesses less than pursers . . . ." *Id.*

These assertions seriously distort the *Laffey* record. In deciding that liquidated damages were unwarranted, the district court expressly determined:

> "While this Court has found as fact that the jobs of purser and stewardess are in fact equal, it was *not* unreasonable for the Company to have believed otherwise . . . . *The Court finds 'good faith' on the part of the Defendant* . . . . The Court does not find an intentional, bad faith, attempt to evade the law." 374 F. Supp. at 1390 (emphasis added).

Contrary to movants' assertion, this finding of petitioner's good-faith motivation was not reversed on appeal. Rather, the court of appeals ruled that some of the factors on which the district court had relied in making a separate ruling about the reasonableness of that good-faith belief were not legally relevant. *See* 567 F.2d at 463-66.

Moreover, the *Laffey* courts imposed liability on Northwest on the basis of their assumption, as explained in conjunction with the discussion of other practices, that an employer is liable for the consequences of any conduct "which was not merely accidental" and that "there is no burden to show additional discriminatory motivation in order to recover under Title VII." 567 F.2d at 454-55. *See id.* at 450-51. Whether that assumption is legally sound is debatable, but movants misstate the *Laffey* record in contending that the courts there found that

petitioner was actually motivated by sex discrimination in paying pursers more than it paid stewardesses, FSA's and stewards.

CONCLUSION

For the foregoing reasons, movants should be denied leave to file the proposed *amici* brief.

Respectfully submitted.

PHILIP A. LACOVARA
GERALD GOLDMAN

Attorneys for Petitioner

October 1980

APPENDIX A

HUGHES HUBBARD & REED
1660 L Street, N.W.
Washington, D.C. 20036
202-862-7400

September 3, 1980

BY HAND

Michael H. Gottesman, Esquire
Bredhoff, Gottesman, Cohen, Channin, Weinberg & Petramalo
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: Northwest Airlines, Inc. v.
Transport Workers Union

Dear Mike:

As you requested, I am providing a courtesy copy of the brief that we filed on behalf of Northwest in the contribution case in the Supreme Court.

Peter Kreindler has mentioned that you are considering filing an *amicus* brief in this case.

Since it is my view that the *Laffey* plaintiffs do not have a legitimate interest in participation in the contribution case at the Supreme Court level, I believe that Northwest would challenge the submission of any such brief. In accordance with Supreme Court Rules 36.2 and 36.3, please advise me of any desire that you may have to tender an *amicus* brief so that I may formally ascertain Northwest's position.

Sincerely,

/s/
Philip A. Lacovara

Enclosure

MOTION FILED
OCT 25 1980

No. 79-1056

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NORTHWEST AIRLINES, INC.

Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

AND

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AND INTERNATIONAL UNION UAW AS AMICI CURIAE

JOHN FILLION
8000 E. Jefferson Avenue
Detroit, Michigan
Counsel for UAW

GEORGE KAUFMANN
2101 L Street N.W.
Washington, D.C.
Of Counsel

J. ALBERT WOLL
815 15th Street, N.W.
Washington, D.C. 20005

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202-637-5390)
Counsel for AFL-CIO

3 3 PRINTED IN U.S.A.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NORTHWEST AIRLINES, INC.

Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO

AND

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND INTERNATIONAL UNION UAW FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), and the International Union UAW respectfully move this Court for leave to file the accompanying brief as *amici curiae* in support of the position of the respondents in this case.

INTEREST OF THE AMICI CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 104 national and international labor organizations representing approximately 13,500,000 employees throughout the United States.

The International Union UAW, which represents approximately 1,250,000 employees, is the largest industrial union in this country.

The AFL-CIO and the UAW have a threefold interest in this matter.

First, the question of the extent to which the federal courts have authority to alter the express terms of statutory enforcement schemes either by implying causes of action or by creating "federal common law" is a recurring issue which touches many of the provisions regulating labor-management relations and internal union affairs. (See. e.g., *Universities Research, Inc.* v. *Coutu,* No. 78-1945.)

Second, as detailed in the brief *amicus curiae* filed in this case by the International Union of Electrical, Radio and Machine Workers, the labor movement has taken an active role in enforcing the employee rights specified in the Equal Pay Act and in Title VII of the Civil Rights Act of 1964. If in situations in which the violation grows out of a collective agreement, the employer can respond to such suits by suing the union seeking by litigation to eradicate the violation, we fear that the attendant financial risks will diminish this salutory means for ending discrimination.

Third, the right of contribution sought here would enable employers to impose liabilities on unions which have not had the benefit of the procedural protections stated in the Act, contrary to the clear intent of Congress.

ISSUES TO BE COVERED IN THE BRIEF AMICI CURIAE

The quesion raised in this case—whether a "federal common law right of contribution" should be recognized—does not depend, as Northwest Airlines would have it, solely on the merits of contribution as an equitable principle. For, Northwest's claim necessarily presents a more fundamental threshold question—whether, to use the illuminating

phrase in *United States* v. *Reliable Transfer,* 421 U.S. 397, 409, the federal courts have the authority "to take the lead" in providing, as a matter of federal common law, contribution to Equal Pay Act-Title VII judgment debtors or whether it is for Congress to take that lead by stating hat right in legislation, expressly or by implication. This latter point which we believe to be the essence of this matter is treated in relatively brief compass by the parties. The purpose of the attached brief *amici curiae* is to explore the ramifications of that separation-of-powers issue and to show that Northwest's invitation to create such a right must be refused because acceptance would require the Court to transgress well-established limits as to the lawmaking role of the federal judiciary.

CONCLUSION

For the above stated reasons this motion for leave to file a brief *amici curiae* should be granted.

Respectfully submitted

JOHN FILLION
8000 E. Jefferson Avenue
Detroit, Michigan
Counsel for UAW

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C.
Of Counsel

J. ALBERT WOLL
815 15th Street, N.W.
Washington, D.C. 20005

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202-637-5390)
Counsel for AFL-CIO

TABLE OF CONTENTS

	Page
MOTION:	i
Interest Of The Amici Curiae	i
Issues To Be Covered In The Brief Amici Curiae	ii
Conclusion	iii
BRIEF:	1
Argument	1
Conclusion	21

TABLE OF AUTHORITIES

CASES:

Alexander v. *Gardner-Denver* 6, 415 U.S. 36 15
Banco Nacional de Cuba v. *Sabbatino*, 476 U.S. 498 20
Bivens v. *Six Unknown Named Agents*, 403 U.S. 398 20-21
Cooper Stevedoring Co. v. *Kopke, Inc.*, 417 U.S. 106 10
Cort v. *Ash*, 422 U.S. 66 15
Clearfield Trust Co. v. *United States*, 318 U.S. 363 21
Gzosek v. *O'Mara*, 397 U.S. 25 ..... 4, 5
Davis v. *Passman*, 442 U.S. 228 ..... 3, 13
Edmonds v. *Compagnie Generale Transatl.*, 433 U.S. 256 11-12
Great American FLSA v. *Novotay*, 422 U.S. 336 .... 15, 16
Halcyon Lines v. *Haenn Ship Corp.*, 342 U.S. 282 .... 8-9, 10, 12
Illinois v. *City of Milwaukee*, 406 U.S. 91 19
Judson v. *Peoples Bank & Trust Co.*, 17 N.J. 67, 110 A.2d 24 10
Miree v. *DeKalb County*, 433 U.S. 25 21
Mohasco Corp. v. *Silver*, 48 L.W. 4851 16
Morange v. *States Marine Lines*, 398 U.S. 375 19

Page

Romero v. *International Term. Co.*, 358 U.S. 354 18
Steele v. *L. & N.R. Co.*, 323 U.S. 192 4
Sullivan v. *Little Hunting Park*, 396 U.S. 229 3
Texas & N.O.R. Co. v. *Railway Clerks*, 281 U.S. 548 13
Textile Workers v. *Lincoln Mills*, 353 U.S. 448 18
The Lottawanna, 21 Wall. 558 18
Touche Ross & Co. v. *Reddington*, 442 U.S. 560 12-13
Transamerica Mortgage Advisors v. *Lewis*, 444 U.S. 11 ..... 5, 12, 13
TVA v. *Hill*, 437 U.S. 153 ..... 6, 12
United Air Lines v. *Evans*, 431 U.S. 553 16
United States v. *Gilman*, 347 U.S. 507 7-8
United States v. *Kimbell Foods, Inc.*, 440 U.S. 715 21
United States v. *Reliable Transfer*, 421 U.S. 397 ii, 2, 18
United States v. *Standard Oil Co.*, 332 U.S. 301 .... 5, 6-7
United States v. *Yellow Cab Co.*, 340 U.S. 543 11
Woodwork Manufacturers v. *NLRB*, 386 U.S. 612 14

Constiutional and Statutory Material:
Constitution of the United States:
Art. I § 1 ..... 2, 18
Art. III § 2 cl. 1 18
Art. III § 2 cl. 2 19
Equal Pay Act:
29 U.S.C. § 206(d) 16
Fair Labor Standards Act:
29 U.S.C. § 216 16
Title VII of the Civil Rights Act of 1964:
42 U.S.C. § 2000(e)-5b 15
42 U.S.C. § 2000(e)-5(f)(1) 15

MISCELLANEOUS
Prosser, Torts, 4th ed. 8, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1056

NORTHWEST AIRLINES, INC.

Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

AND

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AND INTERNATIONAL UNION UAW AS AMICI CURIAE

This brief *amici curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amici curiae* in this case is set forth in that motion.

ARGUMENT

In this case, Northwest Airlines seeks contribution from two unions toward Northwest's judgment liability in an Equal Pay Act-Title VII action brought by certain of the Company's employees and in which the unions were not

named as defendants and did not participate. Northwest "assert[s] a federal common law right of contribution • • •" (Northwest Br. 51).

The question whether a "federal common law right of contribution" should be recognized does not depend, as Northwest would have it, solely on the merits of contribution as an equitable principle—a matter in dispute which the Company oversimplifies (see p. 8, n. 3). For, Northwest's claim necessarily presents a more fundamental threshold question—whether, to use the illuminating phrase in *United States* v. *Reliable Transfer,* 421 U.S. 397, 409, the federal courts have the authority "to take the lead" in providing, as a matter of federal common law, contribution to Equal Pay Act-Title VII judgment debtors or whether it is for Congress to take that lead by stating that right in legislation, expressly or by implication. On the latter point, we see no conceptual difficulties. Northwest's invitation must be refused because acceptance would require the Court to transgress well-established limits as to the law-making role of the federal judiciary. Where, as here, the judicial authority to decide cases in a particular area derives wholly from Acts of Congress, the Court has recognized the overriding principle stated in Art. I § 1 of the Constitution—"All Legislative Power herein granted shall be vested in a Congress of the United States • • •".

1. At the outset Northwest strains to convince the Court that this matter is well within its traditional purview. The means to that end is the suggestion that to "place this case in perspective" it should be recognized that:

> • • • [T]his [is not] a case that requires the creation of implied rights of action to enforce federal statutes. Those rights already exist under the terms of the statutes and under other related doctrines. The simple

> issue is whether the Court agrees, as most lower courts have, that the developing law of remedies warrants recognition of a claim for equitable contribution among parties who already share legal and factual responsibility for a violation of federal employment discrimination laws. [Northwest Br., 11.]

Plainly this is an effort to gain momentum from cases such as *Sullivan* v. *Little Hunting Park,* 396 U.S. 229 (cited at Northwest Br. 12, n.5) which state that "the existence of a statutory right implies the existence of all necessary and appropriate remedies". But the concept of remedy cannot be stretched as far as the Company needs to stretch it. The framework for analysis is provided by *Davis* v. *Passman,* 442 U.S. 228. There the Court proceeded by first inquiring whether federal law "confers" on the claimant the "right" on which his claim rests. (See *id.* at 234-236.) Then the Court turned to the question of whether that right is judicially enforceable, stating:

> * * * [*J*]*urisdiction* is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case * * *; *standing* is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy or at least to overcome prudential limitations on federal-court jurisdiction, * * *; *cause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court; and *relief* is a question of the various remedies a federal court may make available. [442 U.S. at 237-238, n.18. Emphasis in original; citations omitted.]

And the *Davis* Court pointed out: "[T]he question of whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." (*Id.* at 237.)

Thus, to reach remedy issues, the courts must first ascer-

tain whether there is a right of contribution.[1] While Northwest states that this "right already exists under the terms of the statutes and other related doctrines," the Company does not enlighten us as to where the "right" is to be found. So far as Northwest shows or we are aware, there is nothing in any statute granting rights to or imposing obligations on employers and unions *inter se* in situations such as that here. Rather, the Equal Pay Act and Title VII, the sources of Northwest's liability, and the duty of fair representation implied from the Railway Labor Act[2] to

---

[1] This case does not present, and we therefore do not discuss, the complex of questions as to the proper allocation of liability between employers and unions where both parties are properly before a court. (Compare *Czosek* v. *O'Mara*, 397 U.S. 25, cited at Northwest Br. 33 which treats with this problem in a duty of fair representation—breach of contract context.)

[2] Northwest's reference to the duty of fair representation (Northwest Br. 32-33) is not only misleading, but self-defeating. It is misleading in that it seeks to convey the implication that where an employer has violated Title VII and the Equal Pay Act and there is a collective bargaining relationship with a union, the union has necessarily violated that duty. But where an employer violates those statutes, a union's failure to prevent an employer's violation does not necessarily entail a breach of the union's duty of fair representation, if, for example, the union lacked the bargaining power to alter the employer's conduct, or where the union believed in good faiht that the employer's conduct was lawful. On the other hand, there are instances in which a union may violate the duty of fair representation in which neither Title VII nor the Equal Pay Act are implicated at all. In short, Title VII and the Equal Pay Act on the one hand, and the duty of fair representation on the other, are not congruent, and cannot be lumped together as Northwest seeks to do.

Northwest's argument is self-defeating for three reasons:

First, and foremost, although the duty of fair representation has been described as an instance of "federal common law" (Northwest Br. 32), it is far from a judicial invention, as Mr. Chief Justice Stone made clear in the leading case, *Steele* v. *L. & N. R. Co.*, 323 U.S. 192, 202-203:

which the Company also adverts, go no further than to grant certain rights to *employees* and to impose corresponding obligations owing *employees* on employers and unions. And, the Company does not contend that any other source provides a basis for its contribution claim. Moreover, as its statement of position quoted above shows, Northwest disclaims reliance on the line of cases delineating the authority of the federal courts to "impl[y] rights of action to enforce federal statutes", the most recent of which is *Transamerica Mortgage Advisors* v. *Lewis,* 444 U.S. 11. Thus, here as in *United States* v. *Standard Oil Co.,* 332 U.S. 301, 302 this Court is importuned "to create a new substantive legal liability without legislative aid and as at common law".

2. The decisive consideration against that plea, in our view, is that absent Congressional action, the dispute between Northwest and its employees, and all the ramifications of that dispute, would not be governed by federal law. The federal courts have never asserted, and we do not believe that the judiciary could assert, an authority, absent statute, to create a law of fair employment practices in private industry. And, when federal judicial authority results from an Act of Congress, substantive

---

We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them". [See also *id.* at 204: "It is the federal statute which condemns as unlawful the Brotherhood's conduct."]

Second, this is yet another example of Northwest's effort to seize upon a right created for the benefit of *employees* and transmute it into one for the benefit of employers.

Third, *Czosek* v. *O'Mara, supra,* cited by Northwest, provides for an apportionment of damages entirely different from the rule of contribution for which Northwest contends.

rights are either created by the statute or they do not exist. As the Chief Justice reminded in *TVA* v. *Hill*, 437 U.S. 153, 194-195:

> * * * Our system of government is, after all, a tripartite one, with each branch having certain defined functions delegated to it by the Constitution. While "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803), it is equally—and emphatically—the exclusive province of the Congress * * * to formulate legislative policies. * * * Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.
>
> * * *
>
> We agree with the Court of Appeals that in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with "common sense and the public weal." Our Constitution vests such responsibilities in the political branches.

The constitutional allocation of law-making authority stated in *TVA* v. *Hill* applies with full force where as here the federal courts are asked to supplement statutory rights and obligations by creating an additional common law right of contribution. Indeed, on three occasions, in other contexts in which the courts' law making powers are concededly broader than they are when the federal concern is generated by legislation regulating private parties, the Court has declined to create common law rights that would shift liabilities from the place Congress has left those liabilities.

The first of these is *Standard Oil, supra.* There the Government sought to recover from a tort-feasor who had negligently injured a soldier "the amounts expended for hospitalization and * * * pay, as for loss of * * * services".

(322 U.S. at 302.) The Court concluded that the tort-feasor is "not liable from the injuries inflicted upon the Government." (*id.* at 304), reasoning in part:

> We would not deny the Government's basic premise of the law's capacity for growth, or that it must include the creative work of judges. * * * But in the federal scheme our part in that work, and the part of the other federal courts, outside the constitutional area is more modest than that of state courts, particularly in the freedom to create new common-law liabilities, as *Erie R. Co.* v. *Tompkins* itself witnesses. See also *United States* v. *Hudson*, 7 Cranch 32.
>
> Moreover, as the Government recognizes for one phase of the argument but ignores for the other, we have not here simply a question of creating a new liability in the nature of a tort. For grounded though the agreement is in analogies drawn from that field, the issue comes down in final consequence to a question of federal fiscal policy, coupled with considerations concerning the need for and the appropriateness of means to be used in executing the policy sought to be established. * * *
>
> Whatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative power of ours. Congress, not this Court or the other federal courts, is the custodian of the national purse. * * * [332 U.S. at 313-316; footnotes omitted.]

Following *Standard Oil's* lead, the Court in *United States* v. *Gilman*, 347 U.S. 507, refused to create a legal obligation in circumstances strikingly similar to those presented here. In *Gilman*, the Government sought a right to recover indemnity from a federal employee whose negligence had resulted in the Government's tort liability to a third party under the Federal Tort Claims Act. The Government argued "that the right of indemnity, though not expressly granted by the Tort Claims Act, is to be implied" (*id.* at 508). The Court disagreed:

> Here a complex of relations between federal agencies and their staffs is involved. Moreover, the claim now

> asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position. It presents questions of policy on which Congress has not spoken. The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. [347 U.S. at 511-513, footnote omitted.] [3]

The Court has also confronted contribution claims in developing the federal admiralty law. In *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U.S. 282, 284 the Court noted:

> Where two vessels collide due to the fault of both, it is established admiralty doctrine that the mutual wrongdoers shall share equally the damages sustained by each, as well as personal injury and property damage inflicted on innocent third parties. This maritime rule is of ancient origin and has been applied in many cases, but this Court has never expressly applied it to non-collision cases. Halcyon now urges us to extend it to non-collision cases * * *. [Footnote omitted.]

Rejecting that invitation, the Court reasoned:

> In the absence of legislation, courts exercising a common-law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors. * * * To some extent courts exercising jurisdiction in mari-

---

[3] The complexities of the problem of contribution are at least as great as those which cautioned against judicial creation of new rights and obligations in *Gilman*. In fact, as the leading treatise in the field observes (on the very page cited at Northwest Br. 12), the terms of the statutes "which to a greater or lesser extent permit contribution among tortfeasors" differ significantly. (Prosser, Torts, 4th ed. 307.) That treatise continues: "The drafting has not been free from difficulty. Where there is so much variation in the terms of the statutes, and even in the decisions apart from them, little more can be done here to indicate some of the more important questions, and how they have been dealth with." (*Id.* at 307-308.) Dean Prosser discusses eight separate issues (*id.* at 308-310), each of which the courts would be called upon to decide without Congresional guidance if Northwest prevails in its call for a "federal common law of contribution".

time affairs have felt freer than common-law courts in fashioning rules, and we would feel free to do so here if wholly convinced that it would best serve the ends of justice.

We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action. Congress has already enacted much legislation in the area of maritime personal injuries. * * * Many groups of persons with varying interests are vitally concerned with the proper functioning and administration of all these Acts as an integrated whole. We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups. The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run. * * * Should a legislative inquiry convince Congress that a right to contribution among joint tortfeasors is desirable, there would still be much doubt as to whether application of the rule or the amount of contribution should be limited by the Harbor Workers' Act, or should be based on an equal division of damages, or should be relatively apportioned in accordance with the degree of fault of the parties.

In view of the foregoing, and because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so. [342 U.S. at 285-287; Footnotes omitted.] [4]

---

[4] Far from acknowledging, as *Halycon* recognized, that the creation of a right of contribution has in the vast majority of instances been a function of legislative rather than judicial action, Northwest seeks to convey the opposite impression: At almost the outset of its argument, the Company says: "[C]ourts today generally allow contribution under a variety of circumstances. Over the last five decades, 41 states and the District of Columbia has rejected the common law rule and have adopted contribution as a general principle of the law of remedies" (Northwest Br. 12). Thus used, the word "courts" is a verbal artifice which obscures the critical fact that the court have almost always done so in the course of implementing legislation. The very treatise cited by Northwest in the immediate preceding paragraph of its argument shows that what

Halcyon can fairly be read to stand for the proposition that even in admiralty the limits of the federal courts' authority to provide contribution is stated in the ancient rule applied in collision cases or for the narrower conclusion that the federal courts will not disturb the design of federal statutory schemes by adding contribution rights to the rights Congress has established.

In *Cooper Stevedoring Co.* v. *Kopke, Inc.*, 417 U.S. 106, 110-112, the Court endorsed the second of these possibilities, explaining:

> * * * Even though the common law of torts rejected a right of contribution among joint tortfeasors, the principle of division of damages in admiralty has, over the years, been liberally extended by this Court in directions deemed just and proper. * * * Indeed, it is fair to say that application of the rule of division of damages between joint tortfeasors in admiralty cases has been as broad as its underlying rationales.
>
> * * *
>
> Despite the occasional breadth of its dictum, our opinion in *Halcyon* should be read with this historical backdrop in mind. Viewed from this perspective, and taking into account the factual circumstances presented in that case, we think *Halcyon* stands for a more limited rule than the absolute bar against contribution in noncollision cases urged upon us by petitioner. * * * Confronted with the possibility that any workable rule of contribution might be inconsistent with the balance struck by Congress in the Harbor Workers' Act between the interests of carriers, employers, employees, and their respective insurers, we refrained from allowing contribution in the circumstances of that case.

---

was said in *Halycon* is still true: "Over a period of more than a century, only nine American jurisdictions have come to the contrary conclusion, allowing contribution without legislation." (Prosser, Tort, 4th ed, 306.) *Judson* v. *Peoples Bank & Trust Co.*, 17 N.J. 67, 88, 110 A.2d 24, 34 (cited at Northwest Br. 12) is illustrative of the state court decisions allowing contribution following enactments creating that right by "the Legislature, the ultimate arbitor of public policy".

In contrast to the situation in *Halcyon*, that in *Cooper* did not touch an area in which Congress had legislated and the Court therefore concluded, "On the facts of this case, * * * no countervailing considerations detract from the well-established maritime rule allowing contribution between joint tortfeasors". (*Id.* at 113.) [5] *Edmonds* v. *Compagnie Generale Transatl.*, 433 U.S. 256, 271-273 underlines this distinction:

> Though we recently acknowledged the sound arguments supporting division of damages between parties before the court on the basis of their comparative fault, see *United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975), we are mindful that here we deal with an interface of statutory and judge-made law. In 1972 Congress aligned the rights and liabilities of stevedores, shipowners, and longshoremen in light of the rules of maritime law that it chose not to change. * * * By now changing what we have already established that Congress understood to be the law, and did not itself wish to modify, we might knock out of kilter this delicate balance. As our cases advise, we should stay our hand

---

[5] The only case "[o]utside the admiralty context [wherein] this Court has approved contribution * * *" (Northwest Br. 14), *United States* v. *Yellow Cab Co.*, 340 U.S. 543, is far from a sanction of the type of federal judicial lawmaking Northwest proposes. The Court there construed the Federal Tort Claims Act, wherein the United States waived its sovereign immunity on *"any claim"* on account of certain wrongful acts or omission of federal employees, and which provided that the United States would be liable *"if a private person would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred"* (*id.* at 548 quoting from § 410(a) of the FTCA; emphasis in original). Following that directive, this Court "approved contribution" against the United States because such claims were allowed under the local law of the two places where the government employees' wrongful act or omission occurred. The Court most assuredly did not make its own evaluation and affirmatively "approve[] contribution" as a federal policy. The Court was not acting on its own to create a right of contribution, it was following Congress' instructions to apply state law.

> in these circumstances. *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S., at 112; *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S., at 285-286. [Footnote omitted.]

For reasons we discuss below, cases involving the rights and liabilities of the United States or invoking the admiralty jurisdiction are among those in which the federal courts' lawmaking power is particularly broad. Yet the foregoing decisions make it plain that even in these areas the Court has recognized that where "Congress, while acting in the field has stopped short of approving [a] rule of contribution * * * we think it would be inappropriate for us to do so". (*Halcyon*, 342 U.S. at 287.) Where the sole basis of federal jurisdiction is an Act of Congress, there is no justification for independent judicial action. On the contrary there is an even greater inhibition against the courts "preempt[ing] congressional action" (*TVA* v. *Hill*, 437 U.S. at 195).

3. The cases dealing with "the creation of implied rights of action to enforce federal statutes" (Northwest Br. 11), which the Company so carefully eschews, further reinforce that conclusion. The basic rule is stated in *Transamerica Mortgage Advisors, supra:*

> The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction. * * * While some opinions of the Court have placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute, * * * what must ultimately be determined is whether Congress intended to create the private remedy asserted, as our recent decisions have made clear. [444 U.S. at 15-16.]

As Mr. Justice Brennan pointed out in his concurring opinion in *Touche Ross & Co.* v. *Redington*, 442 U.S. 560,

579-580, this Court's precedents plainly preclude such an implication

> * * * [W]hen * * * a statute clearly does not "create a federal right in favor of the plaintiff" * * * when the plaintiff is not "one of the class for whose especial benefit the statute was enacted" * * * and when there is also in the legislative history no "indication of legislative intent, explicit or implicit . . . to create such a remedy" * * *. [Citations omitted.]

An employer seeking contribution toward an Equal Pay Act or Title VII judgment liability is not a member of the class for whose especial benefit the statutes were enacted. That preconditions to the implication of causes of action crystallizes an inherent limitation on the scope of the courts' authority to elaborate federal statutes. The rationale of *Texas & N.O. R. Co.* v. *Railway Clerks,* 281 U.S. 548, the seminal implied-cause-of-action case,[6] is:

> The definite prohibition which Congress inserted in the act * * * [and which] is the essential foundation of the statutory scheme * * * cannot * * * be overriden in the view that Congress intended it to be ignored. As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated. * * * The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. Many rights are enforced for which no statutory penalties are provided. * * * In each instance a legal obligation is created and the statutory requirements are susceptible of enforcement by proceedings appropriate to each. * * * The right is created and the remedy exists. *Marbury* v. *Madison,* 1 Cranch 137, 162, 163. [281 U.S. at 569-570.]

The conclusion that, unless Congress expresses a contrary intent, a legislative declaration of definite rights and obligations whose consequences are not specified is not merely precatory but rather imports an intent "that the customary

---

[6] See *Davis* v. *Passman, supra,* 442 U.S. at 238-239; *Cannon* v. *University of Chicago,* U.S. 667, 732-733 (Powell, J., dissenting).

legal incidents [of that declaration] would follow" (*Transamerica*, 444 U.S. at 19) comports with the general understanding of the purpose of such declarations. That conclusion may therefore be taken to fairly "reconstitute the gamut of values current at the time when the words were uttered" (*Woodwork Manufacturers* v. *NLRB*, 386 U.S. 612, 620 (quoting L. Hand, J.).) That, of course, is precisely the obligation of the courts in interpreting Acts of Congress.

The proposition which Northwest advances, on the other hand, is that where Congress creates enforceable rights in one party against another, the courts may create an additional right of contribution in favor of the latter and against a third party. But that proposition derives no rational support from the animating principle of the implied cause of action cases—that, all other factors being equal, the circumstance that *Congress* has created a right implies that those who are to benefit from that right have a remedy.

There is, moreover, no indication in the legislative history of Title VII or the Equal Pay Act of an intent to create a right of contribution. The indications are, in fact, to the contrary. In *Cannon supra*, 441 U.S. at 699 the Court observed that "it is appropriate * * * to presume that Congress was thoroughly familiar with [this Court's leading decisions] and that it expected its enactment to be interpreted in conformity with them."

As we demonstrated above, those decisions, read most narrowly, make it plain that in accord with the common law, the right of contribution is not one of the "*customary* legal incidents" that follow from statutory enactments, and that it is for Congress to create contribution rights if and when the Legislature determines that such rights are warranted. Against that background we submit that only a

positive expression of an intent to provide for contribution is sufficient. There is no such expression.

A right of contribution in favor of an offending employer is also inconsistent with the remedial schemes of Title VII and the Equal Pay Act. Even a summary description of these statutes, and the underlying legislative materials, demonstrates how great a distortion of the legislative intent would result from granting Northwest contribution under either Title VII or the Equal Pay Act.[7]

---

[7] In two basic respects a right of contribution is *inconsistent* "with the underlying purposes of the legislative scheme * * *" (*Cort* v. *Ash*, 422 U.S. 66, 78) of Title VII:

(i) *Conciliation.* "Under Title VII, cases of alleged employment discrimination are subject to a detailed administrative and judicial process designed to provide an opportunity for non-judicial and non-adversary resolution of claims." (*Great American F.S.L.A.* v. *Novotny*, 442 U.S. 366, 372-373. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44.) The preferred procedure is for conciliation by the EEOC prior to suit, 42 U.S.C. § 2000e-5(b). Although the EEOC's failure to engage in conciliation efforts does not bar court action by the person aggrieved after 180 days, 42 U.S.C. § 2000(e)-5(f)(1), the statute gives the district court authority to stay the action for an additional period to provide another opportunity for conciliation prior to litigation. (*Id.*) Moreover, failure to name a defendant in an EEOC charge is an absolute bar to the imposition of liability, even though there may be joint culpability with a defendant who is charged. (E.g., *EEOC* v. *MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 (6th Cir.).) The clear Congressional policy of "an opportunity to settle disputes through conference, conciliation and persuasion before the aggrieved party was permitted to file a lawsuit," (*Alexander* v. *Gardner-Denver Co.*, 415 U.S. at 44), would be subverted by the recognition of a right of contribution. Uncharged unions would be immune from liability to aggrieved employees—the class for whose benefit the statute was enacted—but would be exposed to liability to employers who violated the Act.

(ii) *Limitations.* Congress placed strict time limits on proceedings under the Act. A violation must be the subject of an EEOC charge within 180 days (or within 300 days in a state with an ap-

The approach suggested by Northwest whereby a party failing to satisfy the established standard for implying

---

plicable state law), or is immune from legal challenge. (*United Air Lines, Inc.* v. *Evans,* 431 U.S. 553, 558; *Mohasco Corp.* v. *Silver,* ..... U.S. ....., 48 L.W. 4851.) Similarly, after a charge is timely filed, right to legal redress is lost if suit is not filed within ninety days of the receipt of a right to sue lttter from the EEOC. 42 U.S.C. § 2000e-5(f)(1). "By choosing what are obviously quite short deadlines, Congress clearly intended to encourage prompt processing of all charges of employment discrimination." (*Mohasco* v. *Silver, supra,* 48 L.W. at 4855.) If a right to contribution were recognized, "[t]he short and precise time limitations of Title VII would be grossly altered," (*Great American F.S.L.A.* v. *Novotny, supra,* 442 U.S. at 376). Again, an employer in violation of the Act would be treated more favorably than an aggrieved employee.

The Equal Pay Act 29 U.S.C. § 206(d), is an even less hospitable source for an implied right of contribution in favor of Northwest. For that Act by its plain terms evinces a Congressional judgement not even to grant employees, the statute's especial beneficiaries, a damage claim against unions.

The Equal Pay Act was enacted in 1963 as an integral component of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* whose enforcement provision (29 U.S.C. § 216) is comprised of a complex series of components providing for criminal proceedings, civil actions by the Government, and *employee* double pay actions against "any *employer* who violates" *inter alia* the equal pay provision. The legislative history of the Equal Pay Act detailed in Section II B 3 of Respondent ALPA's brief shows that Congress acted on the understanding that the only private damage suit permitted is an employee action against an employer. "[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." (*Transamerica, supra,* 444 U.S. at 19.)

Nevertheless, the Company states "the legislative history of the Equal Pay Act persuasively demonstrates that Congress believed the courts would require unions to shoulder equal financial responsibility for their violations." (Northwest Br. 23.) The total support for this assertion from the 1963 reports and debates is first, the following:

causes of action is entitled to simply disclaim relianace on legislative intent and ask the Court to supplement the legislation through federal common law would render meaning-

---

For instance, Representative O'Hara, a member of the subcommittee that had drafted the final bill, stressed that

> "if a labor organization is in any way at fault in maintaining such a discriminatory wage rate, they would be subject to *all the penalties and all the enforcement provisions* provided under the Fair Labor Standards Act."

109 Cong. Rec. 9209 (1963) (emphasis added). [Northwest Br. 26.]

Rep. O'Hara's statement is no broader than the statute—it is plainly true that unions are subject to all the remedies "provided under the Fair Labor Standards Act." But it is equally true that the FLSA does not provide for employee damage suits or employer contribution suits against unions.

Then Northwest quotes (*id.*) 12 words from a floor statement by Rep. Thompson, which we set out in their context:

> Mr. Chairman, * * * The Secretary will only have specific regulatory authority for the enforcement and administration of this act, since it is in fact a part of the Fair Labor Standards Act * * * where there is a charge of discrimination no action can be taken by the Secretary if that discrimination persists, except following an action initiated by him, or it could be initiated by the employee or the employer in a Federal district court. [109 Cong. Rec. 9197.]

Plainly this passage is about Government enforcement in general. And while there is an interjection in that statement referring to some form of employer FLSA suit, the nature and source of which is left entirely vague, we do not believe this snippet, which is the totality of Northwest's showing, can possibly be considered to be a "persuasive demonstration" sufficient to overcome the Act's plain language.

Finally, Northwest relies on the legislative history of the 1962 predecessor to the Equal Pay Act, which, of course, failed of enactment. (Northwest Br. 22, 24-25.) But explanations of the earlier proposal, which was not to be part of the FLSA, and which had an entirely different enforcement scheme providing solely for suits by the Government, are not an accurate guide to the Equal Pay Act the 1963 Congress redrafted and enacted.

less the approach established in this Court's decisions.[8]

4. None of the foregoing is meant to assert that in a carefully delimited area where the Constitution, in terms, or by the very nature of the system of government created therein, grant the judiciary such authority, the courts do not possess, and have not properly exercised, substantial lawmaking power. This Court has, indeed, acted independently in these areas to develop and apply substantive legal rights and obligations. But, if we properly understand the implications of Art. I § 1, and, if we have read the cases correctly, those exercises in judicial lawmaking do not justify the creation of the contribution right sought here.

(a) Federal jurisdiction in admiralty and maritime cases rests on Art. III. § 2, Cl. 1 of the Constitution. That provision is intended to incorporate "the general system of maritime law" as it existed when the Constitution was adopted (*The Lottawanna,* 21 Wall. 558), and to:

> empower the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law "inherent in the admiralty and maritime jurisdiction," *Crowell* v. *Benson*, 285 U.S. 22, 55, and to continue the development of this law within constitutional limits [subject however to] Congress [power] revise and supplement the maritime law within the limits of the Constitution. See *Crowell* v. *Benson, supra,* at 55. [*Romero* v. *International Term. Co.*, 358 U.S. 354, 360-361.]

Against this background, this Court has consistently acted on the understanding that the Constitution grants the judiciary the authority to "take the lead in formulating"

---

[8] *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 457, holds that where "Congress has indicated * * * the purpose to follow [the] course * * * [whereby the] federal courts * * * fashion federal law where federal rights are concerned" that course is open under the Constitution and the courts will carry out the Congressional directive. Thus that decision comports with our understanding of the proper relationship between Congress' lawmaking power and that of the courts.

maritime law. (*Reliable Transfer Co., supra,* 421 U.S. at 409. See also, e.g., *Moragne* v. *States Marine Lines,* 398 U.S. 375.)

(b) As the Court noted in *Illinois* v. *City of Milwaukee,* 406 U.S. 91, 103 "there is a federal common law * * * [w]hen we deal with air and water in their ambient or interstate aspects". Plainly Art. III, § 2, Cl. 2 of the Constitution ("In all cases * * * in which a State shall be Party, the Supreme Court shall have original Jurisdiction") contemplates a large role for the courts in such matters. Moreover, as the Court stressed in *City of Milwaukee,* the judicial authority to adjudicate such disputes according to neutral federal principles is inherent in the plan of the Constitution:

> The leading air case is *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, where Georgia filed an original suit in this Court against a Tennessee company whose noxious gases were causing a wholesale destruction of forests, orchards, and crops in Georgia. The Court said:
>
> > " * * *it is plain that some such demands must be recognized, if the grounds alleged are proved. When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands of the ground of their still remaining *quasi*-sovereign interests; and the alternative to force is a suit in this court. *Missouri* v. *Illinois*, 180 U.S. 208, 241." 206 U.S., at 237.
>
> * * *
>
> When it comes to water pollution this Court * * * [in] *Missouri* v. *Illinois,* 200 U.S. 496, said, "It may be imagined that a nuisance might be created by a State upon a navigable river like the Danube, which would amount to a *casus belli* for a State lower down, unless removed. If such a nuisance were created by a State upon the Mississippi the controversy would be resolved by the more peaceful means of a suit in this court." [406 U.S. at 104, 106-107. (Footnote omitted).]

(c) Based on a similar understanding of the role of the judiciary in furthering the Constitutional plan, the Court

has fashioned federal law in cases involving foreign affairs and international relations. As Mr. Justice Harlan stated in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 425:

> However, we are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law. It seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided *Erie R. Co.* v. *Tompkins.* Soon thereafter, Professor Philip C. Jessup, now a judge of the International Court of Justice, recognized the potential dangers were *Erie* extended to legal problems affecting international relation. He cautioned that rules of international law should not be left to divergent and perhaps parochial state interpretations. [Footnote omitted.]

(d) In a line of cases commencing with *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 398, this Court has recognized private causes of action to enforce rights specifically guaranteed by the Constitution. And in *Davis* v. *Passman, supra,* the Court, recognizing "the question of who may enforce a statutory right is fundamentally different from the question of who may enforce a right that is protected by the Constitution", explained:

> The Constitution, * * * does not "partake of the prolixity of a legal code." *McCulloch* v. *Maryland,* 4 Wheat. 316, 407 (1819). It speaks instead with a majestic simplicity. One of "its important objections," *ibid.,* is the designation of rights. And in "its great outlines," *ibid,* the judiciary is clearly descernible as the primary means through which these rights may be enforced. * * *
>
> At least in the absence of "a textually demonstrable constitutional commitment of [an] issue to a coordinate political department," *Baker* v. *Carr,* 369 U.S. 186, 217 (1962), we presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own con-

> stitutional rights have been violated and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights. [442 U.S. at 241-242.]

(e) Finally, *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, declares:

> This Court has consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs. As the Court explained in *Clearfield Trust Co.* v. *United States*, 318 U.S., at 366-367:
>
> > "When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. . . . The authority [to do so] had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws [of any State]. The duties imposed upon the United States and the rights acquired by it . . . find their roots in the same federal sources. In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards." (Citations and footnote omitted.)

Thus, *Clearfield Trust* and its progeny establish that it is inherent in the Constitutional scheme for establishing a working federal government that the rights and obligations of the United States in carrying out its Constituional powers be determined as a matter of federal law, and that, given the complexity and variety of the Government's affairs, this body of rules include federal common law. Even so, and faithful to its premise, *Clearfield Trust* does not sustain a lawmaking power in the federal courts where there is a dispute between private parties that grows out of government actions. (See *Miree* v. *DeKalb County*, 433 U.S. 25, 30-31.)

CONCLUSION

For the above reasons, that part of the judgment of the

Court of Appeals pertaining to contribution for Equal Pay Act liability should be affirmed; that part of the judgment pertaining to contribution for Title VII liability should be vacated, and remanded with directions to dismiss. Alternatively, the judgment of the Court of Appeals should be affirmed in its entirety.

Respectfully submitted.

JOHN FILLION
8000 E. Jefferson Avenue
Detroit, Michigan
Counsel for UAW

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C.
Of Counsel

J. ALBERT WOLL
815 15th Street, N.W.
Washington, D.C. 20005

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202-637-5390)
Counsel for AFL-CIO

MOTION FILED
OCT 25 1980

No. 79-1056

IN THE

Supreme Court of the United States

October Term, 1980

NORTHWEST AIRLINES, INC., *Petitioner,*

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

and

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF THE INTERNATIONAL UNION OF ELECTRICAL, RADIO, AND MACHINE WORKERS, AFL-CIO

WINN I. NEWMAN
CAROLE WILSON
1126 Sixteenth Street, N.W.
Washington, D.C. 20036

RICHARD B. SOBOL
MICHAEL B. TRISTER
ANN H. FRANKE
Sobol & Trister
910 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 223-5022
Attorneys for Amicus Curiae

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

IN THE

Supreme Court of the United States

No. 79-1056

NORTHWEST AIRLINES, INC., *Petitioner,*

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

and

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The International Union of Electrical, Radio and Machine Workers, AFL-CIO ("IUE") moves, pursuant to Rule 36.3 of the Rules of this Court, for leave to file the attached Brief Amicus Curiae in this case.

INTEREST OF AMICUS

IUE and its affiliated locals are the collective bargaining representatives for employees at nearly 1,000 companies in the electrical equipment industry. IUE represents more than 300,000 members, of whom approximately 45% are women and Blacks or other minorities.

In this case, Northwest Airlines argues that the respondent unions share the culpability for the discriminatory practices found by the lower courts in the *Laffey* litigation, and claims that a right of contribution generally would have

a deterrent effect on unions and enhance compliance with the fair employment laws. This argument assumes union resistance to, rather than support of, equal employment opportunities. In fact, however, the role of unions in the enforcement of federal anti-discrimination laws, and hence the effect of a right of contribution, is far more complex than suggested by Northwest.

Unlike the typical situation in which contribution has been recognized, unions not only may be held directly liable to employees in Title VII cases, they may also bring legal actions to enforce the Act. Since its Organizational Convention in 1949, IUE has pledged itself to the elimination of invidious discrimination in employment.[1] Pursuant to this mandate, the Union has conducted an extensive legal program to assist employees in filing charges of discrimination and in instituting legal actions to enforce federal fair employment laws. Many of these cases have been brought by IUE and its locals as named plaintiffs, and IUE has supported individual employees in many other cases in which the unions were not named. These efforts were recently described by Member Murphy of the National Labor Relations Board in the following terms:

> [IUE] has been a prime mover for equality in the workplace . . . It is a union which is dedicated to bettering the working conditions of its members and is equally dedicated to wiping out any vestige of

---

[1] Women have always been employed in large numbers in the electrical equipment industry, in part due to the availability and willingness of women, generally at low wages, to perform the intricate work that is required. At present, more than one million women are employed in the industry. Except for periods of national emergency when women have been needed to work in all types of jobs, women in the industry traditionally have been restricted in the jobs which they are permitted to perform. In addition, jobs predominantly filled by women have always been paid less than jobs of similar skill and worth performed by men.

employment discrimination based on artificial grounds. This Union and its General Counsel have contributed immensely to achieving these goals.

General Motors Corp., 243 NLRB No. 19 (1979) (dissenting opinion), petition for review pending, Nos. 79-1682, et al. (D.C. Cir.).

By exposing unions to financial liability which they otherwise would not have, recognition of a right of contribution would discourage unions from undertaking to enforce the fair employment laws. Furthermore, apart from liability, the assertion of a claim for contribution creates conflicts between the unions and the aggrieved class which impedes a union's ability to enforce the fair employment laws. In its efforts to enforce fair employment laws, IUE has had practical experience with the deleterious effects of even an employer's assertion of a right to contribution, wholly apart from its vindication. In order to insure that all of the consequences of a right to contribution are brought before the Court, this motion for leave to file brief amicus curiae should be granted.

Respectfully submitted,

WINN I. NEWMAN
CAROLE WILSON
1126 Sixteenth Street, N.W.
Washington, D.C. 20036

RICHARD B. SOBOL
MICHAEL B. TRISTER
ANN H. FRANKE
Sobol & Trister
910 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 223-5022

Attorneys for Amicus Curiae

October 25, 1980

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
INTEREST OF AMICUS	1
SUMMARY OF ARGUMENT	11
ARGUMENT	13
I. RECOGNITION OF A RIGHT TO CONTRIBUTION IN FAIR EMPLOYMENT CASES WILL SERIOUSLY HAMPER UNION ENFORCEMENT PROGRAMS	13
II. CREATION OF A RIGHT TO CONTRIBUTION WILL UPSET THE DELICATE BALANCE REGARDING UNIONS ESTABLISHED BY CONGRESS IN TITLE VII	18
CONCLUSION	19

TABLE OF AUTHORITIES

CASES: Page

Air Line Stewards & Stewardesses Ass'n v. *American Airlines*, 490 F.2d 639 (7th Cir. 1973) 13

Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) .. 14

E.E.O.C. v. *Chrysler Corp.*, No. 78-3394 (6th Cir. May 16, 1980) 17

E.E.O.C. v. *Chrysler Corp.*, 8 FEP Cases 343 (S.D. Ohio 1974) 17

E.E.O.C. v. *MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 (6th Cir. 1974) 17

Emporium Capwell Co. v. *Western Addition Comm. Org.*, 420 U.S. 50 (1975) 18

Grogg v. *General Motors Corp.*, 72 F.R.D. 78 (S.D.N.Y. 1976) 14, 15

Guy v. *Robbins & Myers, Inc.*, 525 F.2d 124 (6th Cir. 1975), *aff'd sub nom I.U.E.* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976) 17

Henry v. *Westinghouse Electric Corp.*, 13 FEP Cases 799 (S.D. Ind. 1976) 17

I.U.E. v. *Westinghouse Electric Corp.*, 73 F.R.D. 57 (W.D.N.Y. 1976) 13, 14

I.U.E. v. *Westinghouse Electric Corp.*, 17 FEP Cases 16 (N.D. W.Va. 1977) 14, 16

I.U.E. Local 201 v. *General Electric Co.*, C.A. No. 78-1045-Mc (D. Mass.) 16

International Chemical Workers Union v. *Planters Mfg. Co.*, 259 F.Supp. 365 (N.D. Miss. 1966) 13

International Woodworkers of America v. *Georgia-Pacific Corp.*, 568 F.2d 64 (8th Cir. 1977) 13, 14

CASES

Table of Authorities — Continued

Page

Johnson v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974) 15

Krikorian v. *General Electric Co.*, C.A. No. 78-1444-Mc (D. Mass.) 16

Local 186, International Pulp, Sulphite and Paper Mill Workers v. *Minnesota Mining and Mfg. Co.*, 304 F.Supp. 1284 (N.D. Ind. 1969) 13

Local 194 v. *Standard Brands, Inc.*, 540 F.2d 864 (7th Cir. 1976) 13, 14

Lynch v. *Sperry Rand Corp.*, 62 F.R.D. 78 (S.D.N.Y. 1973) 14, 15

Macklin v. *Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973) 15

Patterson v. *American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976) 15

Social Services Union, Local 535 v. *County of Santa Clara*, 609 F.2d 944 (9th Cir. 1979) 13

United Packinghouse, Food & Allied Workers, Int. Union v. *N.L.R.B.*, 416 F.2d 1126 (D.C. Cir. 1969) 18

STATUTE AND RULES:

Civil Rights Act of 1964

§ 706(b) 13

§ 706(f)(1) 13

Federal Rules of Civil Procedure

Rule 19(a) 16

Rule 23 15

OTHER AUTHORITIES:

EEOC, Background Paper And Resolution To Encourage Voluntary Affirmative Action In Collective Bargaining, reprinted in BNA, Daily Labor Report (April 2, 1980), p. D-1 17

EEOC, Opinion of the General Counsel (May 6, 1966), reprinted in part, *International Chemical Workers Union* v. *Planters Mfg. Co.*, 259 F.Supp. 365, 368 (N.D. Miss. 1966) 13

S. Rep. No. 92-415, 92d Cong., 1st Sess. (1972) 13

IN THE

Supreme Court of the United States

October Term, 1980

No. 79-1056

NORTHWEST AIRLINES, INC., *Petitioner,*

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

and

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF AMICUS CURIAE ON BEHALF OF THE INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO

The International Union of Electrical, Radio and Machine Workers, AFL-CIO ("IUE") submits this Brief Amicus Curiae in support of the position of the respondent labor organizations in this case.

INTEREST OF AMICUS: THE IUE PROGRAM TO ENFORCE FEDERAL FAIR EMPLOYMENT LAWS

As set forth in the Motion for Leave to File Brief Amicus Curiae, the interest of IUE in this case derives from the negative effect which recognition of a right to contribution will have on the efforts of the IUE to en-

force federal fair employment laws. In order to appreciate the extent of this interest, it is important to recognize the breadth of the IUE enforcement program and the results which it has achieved.

Since its establishment as a labor organization in 1949, the IUE has vigorously and persistently worked to achieve equality of employment opportunity for its female and minority members.[1] The Union has been in the forefront of efforts to obtain federal legislation to protect the rights of minority and female workers.[2] It has also attempted for many years to end discriminatory employment practices through collective bargaining at the national and local

---

[1] The delegates to the IUE's Organizational Convention in 1949 adopted a resolution calling for the establishment of a Civil Rights and Fair Practices Department as an administrative unit within the IUE and urging affiliated IUE locals to establish similar units. Proceedings, IUE Organizational Convention, p. 175 (1949). The Union's Second Convention in 1950 affirmed the establishment of this Department and further resolved that it "engage in all necessary activities and programs . . . to abolish all discrimination on grounds of race, color, sex, nationality or creed." Proceedings, IUE Second Constitutional Convention, p. 238 (1950). Subsequent IUE conventions have adopted increasingly strong resolutions condemning race, sex and other invidious discrimination, and pledging the resources of the Union to a farreaching effort to achieve non-discrimination in the workplace.

[2] In 1962 and 1963, the IUE presented testimony on several occasions endorsing federal equal pay legislation. E.g., *Hearings on H.R. 3861 Before the Special Subcommittee on Labor of the House Committee on Education and Labor,* 88th Cong., 1st Sess. 108 (1963); *Hearings on H.R. 8898 Before the Select Subcommittee on Labor of the House Committee on Education and Labor,* 87th Cong., 2d Sess. 169, 181 (1962). The Union also strongly supported the enactment of Title VII. E.g., *Hearings on H.R. 405 and Similar Bills to Prohibit Discrimination in Employment Before the General Subcommittee on Labor of the House Education and Labor Committee,* 88th Cong., 1st Sess. 66 (1963). After the decision in *General Electric Co.* v. *Gilbert,* 429 U.S. 125 (1976), the

levels,[8] and through grievances and arbitration where these remedies are available. Finally, and most importantly for purposes of this case, since 1972 IUE has undertaken a

---

IUE strongly supported legislation to amend Title VII to require employers to provide disability benefits for pregnancy. *Hearings on S.995 Before the Subcommittee on Labor of the Senate Committee on Human Resources,* 95th Cong., 1st Sess. 222 (1977).

[8] IUE's collective bargaining efforts with respect to EEO issues at one of the major employers in the electrical manufacturing industry were recently summarized by an NLRB Administrative Law Judge:

> In the 1954 national negotiations the Union unsuccessfully proposed contract clauses providing for equal pay without distinction as to sex, and extension of hospitalization benefits to cover pregnancy and childbirth. In 1958 IUE added a proposed clause eliminating wage differentials based on sex, and in 1960, also proposed extending contractual pension provisions to widows and survivors. In 1963 IUE again submitted the above proposals, together with a proposal to amend the antidiscrimination clause of the National Agreement (Section IV, paragraph 3), to include a reference to sex. The latter proposal was resubmitted and adopted by the parties in 1966, and the reference to women's and men's jobs was simultaneously deleted from the contract. In 1970 the antidiscrimination clause was again amended to add a reference to age. The clause is not subject to contractual arbitration, although the National Agreement leaves the Union free to strike over nonarbitrable grievances. In 1966, 1970 and 1973, the Union unsuccessfully proposed that the clause be made subject to binding arbitration. In these negotiations IUE made other proposals which related or purported to relate to the status of female and minority group employees. In 1966 and 1970, IUE proposed clauses to prohibit sex discrimination in upgrading and layoffs, extention of disability insurance coverage to pregnancy, and training of females for higher paying jobs. In 1970 and in 1973, IUE proposed a layoff and recall system based on plantwide seniority, and plantwide posting of job opportunities. In 1973 IUE also proposed a joint employer-union committee, coupled with binding arbitration, to review rates alleged to be discriminatory, and elimination of all contract provisions which treated pregnancy in a different manner from other forms of disability, e.g., a provision requiring 9 months employment as a prerequisite for receipt of benefits.

major legal program to enforce the rights of its members under fair employment laws.[4]

Westinghouse Electric Corp., 239 NLRB 106, 128 (1978). Similar efforts have been made by IUE with the other major employers in the industry and by IUE locals throughout the country. See, e.g., *General Motors Corp.*, 243 NLRB No. 19 (1979).

[4] On March 31, 1972 the Equal Employment Opportunity Commission issued comprehensive Guidelines on Discrimination Because of Sex which established principles to guide employers, unions and other persons with respect to employment practices adversely effecting women. See 37 F.R. 6836 (April 2, 1972), 29 C.F.R. § 1604.1 *et seq.* At its Convention in June of the same year, IUE pledged to "take all the necessary steps to assure compliance with the [Guidelines] by all employers with whom it has contracts." Proceedings, IUE 15th Constitutional Convention, p. 190 (1972). Pursuant to this mandate, the IUE Executive Board in March, 1973 directed all IUE locals to examine their existing contracts and practices using guidelists prepared by IUE to determine whether there was discrimination. Local unions that found practices which they believed to be discriminatory were instructed to seek immediate changes from the employer. The Executive Board pledged "to take appropriate legal steps with respect to any employer who refuses to amend existing agreements in order to comply with the policy of this Union and the requirements of the law."

In order to facilitate the review process, the IUE Executive Board subsequently instructed local unions to obtain from employers certain statistical and other information related to the employers compliance with Title VII and the Equal Pay Act. When a number of employers declined to provide this information for bargaining purposes, IUE filed unfair labor practices charges. After protracted litigation, the NLRB upheld IUE's right to the requested civil rights related information. *Westinghouse Electric Corp.*, 239 NLRB 106 (1978), petitions for review pending, Nos. 78-2067, et al. (D.C. Cir.); *East Dayton Tool & Die Co.*, 239 NLRB 141 (1978), petitions for review pending, Nos. 78-2066, et al. (D.C. Cir.); *The Bendix Corporation*, 242 NLRB No. 8 (1979), petition for review pending, No. 79-1479 (D.C. Cir.); *The Bendix Corporation*, 242 NLRB No. 170 (1979), petitions for review pending, Nos. 79-1609, et al. (D.C. Cir.); *White Farm Equipment Co.*, 242 NLRB No. 201 (1979), petitions for review pending, Nos. 79-1654, et al. (D.C. Cir.); *General Motors Corp.*, 243 NLRB No. 19 (1979), petitions for review pending, Nos. 79-1682, et al. (D.C. Cir.).

Pursuant to the IUE enforcement program, IUE and IUE locals have filed more than 500 charges of sex or race discrimination with the Equal Employment Opportunity Commission or with similar state agencies. In addition, IUE and IUE locals have filed more than fifty actions in court seeking redress from sexually or racially discriminatory employment practices. Ten such cases are presently pending before federal courts under Title VII or the Equal Pay Act. In each of these cases, the IUE or its locals have been named as plaintiffs along with women employees in the bargaining units.

The IUE legal program has achieved significant results, both in modifying employers' future practices and in providing relief to protected group employees for prior discrimination. A Title VII action brought by IUE against Sperry Rand Corporation, for example, resulted in the company's agreement to revise its sexually discriminatory pension policies and to make available $2.5 million in increased pension benefits. *Lynch* v. *Sperry Rand Corp.*, No. 70 Civ. 4809 (S.D.N.Y.). In settlement of two cases involving the Westinghouse Electric plant in Mansfield, Ohio, the company agreed to pay $160,000 to a class of female employees who had been prematurely furloughed as a result of separate seniority lists for men and women and to adjust the pension rights and seniority rights for these women. The employer also agreed to increase the job rates for nine traditionally female job classifications and to pay backpay to employees who had worked in these jobs. *IUE and Rhinehart* v. *Westinghouse Electric Corp.*, No. C-70-537; *Albrecht* v. *Westinghouse Electric Corp.*, No. C-70-912 (N.D. Ohio).

As the result of an IUE suit at General Electric's Tyler, Texas plant, the company agreed to discontinue its requirement that all employees be at least 5 feet 7 inches tall and to provide compensatory relief to women who had been injured by the limitation. *Allen* v. *General Electric Co.*,

C.A. 5452 (E.D. Tex.). A Title VII action brought by IUE involving Westinghouse Electric's Newark, Ohio plant resulted in the rehiring, with backpay and retroactive seniority, of a group of female employees who had been laid off ahead of men with lesser seniority, as well as an agreement to permit so-called upward bumping to avoid future layoffs and to permit women to achieve their "rightful place" by bumping less senior male employees in higher grades. *Nutter and IUE* v. *Westinghouse Electric Corp.*, No. C-2-75-602 (S.D. Ohio). A case involving the discriminatory layoff of female employees at General Electric's Pittsburgh Apparatus Service Shop has resulted in a recent settlement under which $176,250 will be paid by the company to a class of eighteen women, plus pension coverage and other relief. See, *Smouse* v. *General Electric Co.*, 626 F.2d 333 (3d Cir. 1980).

A major focus of IUE's legal program has been employer practices that disadvantage pregnant workers. After the EEOC Sex Discrimination Guidelines held that discrimination against pregnant employees constitutes a violation of Title VII, 29 C.F.R. § 1604.10, IUE filed charges with the EEOC alleging that the three largest employers in the electrical manufacturing industry—General Electric, Westinghouse and General Motors—discriminated against pregnant employees in a number of their practices. Subsequently, nationwide class actions were filed by IUE in federal court against the three companies. In one of these, IUE was successful in the district court and in the court of appeals in establishing that the denial of sickness and accident benefits for pregnancy-related disabilities violated Title VII, *Gilbert and IUE* v. *General Electric Co.*, 375 F.Supp. 367 (E.D.Va. 1974), *aff'd*, 519 F.2d 611 (4th Cir. 1975), but this Court ultimately reversed that decision. *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976). In the Westinghouse case, IUE attorneys overcame a motion to dismiss founded on *Gilbert*, *Eberts* v. *Westinghouse Electric Corp.*, 581 F.2d 357 (3d Cir. 1978), and a settlement

has been achieved that will provide $305,000 in backpay to women who suffered from a number of the company's pregnancy policies, as well as injunctive and other individual relief. A settlement has also been proposed in the action brought against General Motors. *Grogg and IUE* v. *General Motors Corporation,* 73 Civ. 63 (S.D.N.Y.).

A longtime concern of IUE in its efforts to eliminate sexually discriminatory employment practices has been the problem in the electrical manufacturing industry of systematic underpayment of jobs—such as assembly line jobs —traditionally performed by women.[5] In *Burry* v. *General Electric Co.,* No. 72853 (N.D. Ind.), an action challenging pay practices at GE's Ft. Wayne, Indiana plant under the Equal Pay Act, a settlement was obtained providing $300,000 in backpay and the same amount annually in future pay increases for 350 employees who occupied 19 traditionally female jobs classified below their actual value.[6] In *Casimer* v. *General Electric Company,* No. C-72-716 (N.D.Ohio), IUE, IUE Local 707 and 30 women workers

---

[5] Attention first was drawn to this situation more than thirty-five years ago by the War Labor Board which found that two of the major employers in the industry, General Electric Company and Westinghouse Electric Corporation, had arbitrarily reduced the wages for jobs performed by women by as much as one-third below the proper rates determined by their own job evaluators. *In Re General Electric Co.,* 28 War Lab. Bd. R. 666 (1945). IUE believes that these sex-based wage disparities have never been eliminated.

[6] As part of the settlement, GE also agreed to reevaluate the rates paid to approximately 170 other job classifications not covered by the increases. In negotiations resulting from the reevaluation, IUE obtained increases for an additional 1650 employees, almost all of whom were women, totalling approximately $700,000 annually. The settlement of the Fort Wayne litigation set the pattern for the resolution of IUE grievances at plants carrying out similar functions in Youngstown, Ohio and Tiffin, Ohio, where GE agreed to increase the rates of traditionally female jobs in 21 and 29 classifications, respectively.

at General Electric's Cleveland Wire Drawing Plant challenged a practice dating back to 1958 under which male wire drawers were paid more than females doing substantially the same jobs. Male employees whose rates were reduced by the company in 1972 in an effort to reduce the disparities later joined as plaintiffs in the action. In November 1978 a settlement was achieved under which GE agreed to increase the labor grade of several classifications and to pay $130,000 in backpay.

In 1974, IUE, four of its locals and a group of female employees challenged the initial assignment, promotion and compensation practices at Westinghouse plants in Fairmont, West Virginia, Buffalo, New York, and Trenton and Bloomfield, New Jersey. The Fairmont case was settled by the plaintiffs in return for the company's agreement to raise the labor grades of 13 job classifications a total of 22 labor grades, to pay backpay to the persons who occupied these jobs in the preceding five years, to expand job posting practices to include posting of all job vacancies, to establish new training opportunities for craft jobs traditionally filled by men, and other relief. *IUE* v. *Westinghouse Electric Corp.*, C.A. 75-62-F (N.D.W.Va.). In addition to a partial settlement resolving many of the issues raised, the Trenton case has resulted in a major appellate decision defining the scope of Title VII in the area of wage discrimination. *International Union of Electrical, Radio and Machine Workers* v. *Westinghouse Electric Corporation*, —F.2d—, 23 FEP Cases 588 (3d Cir. 1980), petition for rehearing pending.[7] The Buffalo and Bloomfield cases

---

[7] It does not effect the legal issues for decision in this case, but we do note that the Third Circuit held that Title VII's prohibition against sex discrimination in compensation is broader than that of the Equal Pay Act, not identical to it as Northwest has asserted. Brief of Northwest Airlines, Inc., p. 30. See also *Gunther* v. *County of Washington*, 602 F.2d 882 (9th Cir. 1979), on rehearing, 22 FEP Cases 1650 (1980), petition for certiorari pending, No. 80-429 (O.T. 1980).

are still pending.[8]

In addition to IUE, a number of other International Unions and numerous local unions have initiated actions to enforce federal fair employment laws.[9] As we

---

[8] Shortly after the cases were filed, however, thirteen female job classifications at the Bloomfield plant were upgraded from three to seven labor grades, and a plantwide wage review was conducted in Buffalo which resulted in increases in the classification of 90% of the predominantly female jobs in the plant.

[9] The International Woodworkers of America (IWA) has filed a large number of Title VII actions on behalf of its black members in the southern wood products industry. Six of the original actions filed by the IWA resulted in settlements totalling about $400,000 in backpay for about 1000 victims of discrimination, as well as substantial prospective relief. Youngdahl, Equal Employment And Affirmative Action: The Union Role, 27th Annual New York University Conference On Labor, 163, 175-180 (1974). See *International Woodworkers of America* v. *Georgia-Pacific Corp.*, 568 F.2d 64 (8th Cir. 1977).

The Communications Workers of America (CWA) has filed over 100 EEOC charges against AT&T and other telephone companies alleging sex discrimination in connection with pregnancy. See, *Discrimination on the Basis of Pregnancy, 1977: Hearings on S.995 Before the Subcommittee on Labor of the Senate Committee on Human Resources,* 95th Cong., 1st Sess. 272 (1977) (statement of Glenn E. Watts). The union has filed eight federal suits against employers for discrimination related to pregnancy. *Southwestern Bell Tel. Co. Maternity Benefits Litigation,* 602 F.2d 845 (8th Cir. 1979); *CWA* v. *AT&T Long Lines Dept.*, 513 F.2d 1024 (2d Cir. 1975); *CWA* v. *Mountain States Tel. & Tel Co.*, 18 FEP Cases 281 (D. Colo. 1977); *CWA* v. *New York Telephone Co.*, 8 FEP Cases 509 (S.D.N.Y. 1974); *CWA* v. *Illinois Bell Tel. Co.*, 16 FEP Cases 1494 (N.D. Ill. 1973); *CWA* v. *Southern Bell Tel. & Tel. Co.*, C.A. No. C-73-1739 (N.D. Cal. 1973); *CWA* v. *General Telephone of California* (N.D. Cal. 1973).

The International Union, United Automobile, Aerospace and Agricultural Implement Workers (UAW) has been active in the enforcement of Title VII. *UAW* v. *Detroit Plastic Molding Co.*, Civil Action Nos. 78-70991, 79-72597 (E.D. Mich.), challenges a

variety of employment practices as discriminatory on grounds of both sex and race. In *UAW* v. *Taylor,* 8 FEP Cases 622 (E.D. Mich. 1974), *aff'd* in unpublished opinions Nos. 76-1474, 76-1966, 76-1767 (6th Cir. 1977), *cert. denied* in No. 76-1966 *sub nom. Firestone Tire & Rubber Co.* v. *Taylor,* 435 U.S. 970 (1978), the union secured the invalidation under Title VII of a state law denying unemployment benefits to pregnant women. After the state law was struck down, the EEOC filed suit against Chrysler Corporation, based on a charge submitted by the UAW, for payment of retroactive benefits. The UAW intervened as a plaintiff. *EEOC* v. *Chrysler Corp.,* appeal pending No. 80-1203 (6th Cir.). The UAW has filed numerous other EEOC charges, including 3 nationwide charges against Ford, Chrysler and General Motors for pregnancy discrimination, more than 30 charges against individual plants for violations of the 1978 pregnancy disability amendments to Title VII, and 20 charges against General Motors concerning state "female protective" laws.

The Newspaper Guild, which represents 34,000 employees in editorial, advertising, business and other non-mechanical departments of newspapers, magazines and wire services, has undertaken Title VII litigation as one component of its civil rights program. *Rosario* v. *New York Times Co.,* 74 Civ. 4457 (S.D.N.Y.), was filed by the Guild and a class of minority employees alleging racial discrimination. The basis for the suit was a 1973 EEOC charge filed by the Guild. The parties recently negotiated a settlement, now under consideration by the court, which provides monetary relief in excess of $549,000. In 1973 the Guild filed charges of race and sex discrimination against the Associated Press with the EEOC and human rights agencies in six states. After unsuccessful conciliation, a Guild local and eight present and former members filed suit in 1978. *Wire Service Guild Local 222 et al.* v. *Associated Press,* C.A. 78-4502 (S.D.N.Y.).

Many other international and local unions have brought Title VII actions to secure the rights of their members. *E.g., Air Line Stewards and Stewardesses Ass'n Local 550* v. *Trans World Airlines,* 23 FEP Cases 119 (7th Cir. 1980); *Social Service Union Local 535* v. *County of Santa Clara,* 609 F.2d 944 (9th Cir. 1979); *Local 194, Retail, Wholesale and Department Store Union* v. *Standard Brands, Inc.,* 540 F.2d 864 (7th Cir. 1976); *United Transportation Union Local 974* v. *Norfolk Western Ry. Co.,* 533 F.2d 336 (4th Cir. 1975); *Air Line Stewards & Stewardesses Ass'n* v. *Ameri-*

show in the body of this Brief, if a right to contribution on behalf of employers is recognized by this Court, union enforcement efforts such as these will be seriously hampered.

SUMMARY OF ARGUMENT

Unions have a well recognized right to file administrative charges and to institute judicial proceedings to enforce Title VII. Contemporaneous rulings by the EEOC and early judicial opinion recognizing this right were approved by Congress in 1972 and have been uniformly followed by the courts.

Unions can make important contributions to the enforcement of the federal fair employment laws. Through their knowledge of plant practices and access to civil rights related information from employers, unions can bring to light discriminatory practices by employers, inform workers about their rights, and assist them in seeking redress from authorities. Where litigation is necessary, unions can

---

can Airlines, 490 F.2d 639 (7th Cir. 1973); *Rosen and Utility Co. Workers Ass'n* v. *Public Service Elec. & Gas Co.,* 477 F.2d 90 (3d Cir. 1973); *Air Line Pilots Ass'n* v. *Western Air Lines,* 23 FEP Cases 1042 (N.D. Cal. 1979); *NAACP and Postal Workers Union* v. *U.S. Postal Service,* 22 FEP Cases 502 (N.D. Ga. 1977); *Schoeppner and IBEW* v. *General Telephone Co. of Pennsylvania,* 417 F.Supp. 453 (W.D. Pa. 1976); *Thompson and Michigan Ed. Ass'n* v. *Board of Education,* 71 F.R.D. 398 (W.D. Mich. 1976); *Power Division Ass'n* v. *New Orleans Public Service Corp.,* 14 FEP Cases 257 (E.D. La. 1975); *Air Line Pilots* v. *Ozark Air Lines,* 10 FEP Cases 463 (N.D. Ill. 1975); *Air Line Pilots* v. *Continental Air Lines,* 10 FEP Cases 462 (N.D. Ill. 1974); *Amalgamated Meat Cutters Local 340* v. *Safeway Stores, Inc.,* 52 F.R.D. 373 (D. Kansas 1971); *Local 186, International Pulp, Sulphite and Paper Mill Workers* v. *Minnesota Mining and Mfg.,* 304 F.Supp. 1284 (N.D. Ind. 1969); *International Chemical Workers Union* v. *Planters Mfg. Co.,* 259 F.Supp. 3656 (N.D. Miss. 1966).

provide badly needed financial and legal assistance, and they can offer moral support and valuable information.

Creation of an employer's right to contribution would hamper union efforts to enforce or support the enforcement of fair employment laws in three significant ways. First, if charges or litigation filed by or with the assistance of a union can lead to liability for that union, unions will be discouraged from undertaking such efforts. The result will be that many discriminatory employment policies and practices will remain uncorrected and unredressed.

Second, a claim for contribution provides a tactical weapon which employers regularly use to hamper fair employment litigation initiated by unions. The mere assertion of a claim for contribution against the union creates a conflict of interest which prevents union counsel from also representing the aggrieved employees, thus forcing the employees to retain independent counsel, if that is possible. The possibility of a conflict may also impede cooperation between union counsel and counsel for the aggrieved class.

Third, recognition of a right to contribution will impede union support for fair employment actions brought against employers by individual employees or the EEOC. Rather than providing their assistance to these plaintiffs through intervention, realignment or crossclaims, as the IUE and other unions often elect to do, unions would be encouraged to aid in the defense of the actions in order to avoid the possibility of future liability.

Unions have a unique status under Title VII. They may be held liable directly to employees for their discriminatory acts. But they may also take action to aid employees in enforcing the laws. Recognition of a right to contribution as urged by Northwest would upset this delicate balance by giving employers the ability to impede union enforcement efforts. For this reason, a right of contribution should not be adopted by this Court.

ARGUMENT

1. Recognition of a Right to Contribution in Fair Employment Cases will Seriously Hamper Union Enforcement Programs.

Shortly after the enactment of Title VII, the General Counsel of the EEOC ruled that a Union is a "person aggrieved" within the meaning of sections 706(b) and (f)(1) of Title VII, for purposes of filing administrative charges and instituting judicial proceedings to redress unlawful discrimination against its members. EEOC, Opinion of the General Counsel (May 6, 1966), reprinted in part, *International Chemical Workers Union* v. *Planters Mfg. Co.*, 259 F.Supp. 365, 368 (N.D. Miss. 1966). In the *Chemical Workers* case, *supra*, the district court adopted this interpretation of the General Counsel and sustained the union's right to sue under Title VII on behalf of its members. *Accord, Local 186, International Pulp, Sulphite and Paper Mill Workers* v. *Minnesota Mining and Mfg. Co.*, 304 F.Supp. 1284 (N.D. Ind. 1969). This interpretation was approved by Congress in 1972, S.Rep. No. 92-415, 92d Cong., 1st Sess., p. 19 n. 16, and has been uniformly accepted by the courts. See, e.g., *Social Services Union, Local 535* v. *County of Santa Clara*, 609 F.2d 944 (9th Cir. 1979); *International Woodworkers of America* v. *Georgia-Pacific Corp.*, 568 F.2d 64 (8th Cir. 1977); *Local 194* v. *Standard Brands, Inc.*, 540 F.2d 864 (7th Cir. 1976); *Air Line Stewards & Stewardesses Ass'n* v. *American Airlines*, 490 F.2d 639, 642 (7th Cir. 1973); *I.U.E.* v. *Westinghouse Electric Corp.*, 73 F.R.D. 57, 59 (W.D.N.Y. 1976).

Through their knowledge of plant practices, often dating back many years, and their right of access to pertinent information from the employers, see *supra*, p. 4, unions are in an excellent position to identify discriminatory practices by employers, which may otherwise have gone unrecognized by the affected employees. They are also able to inform affected workers about their rights and to assist them in bringing their complaints before the proper au-

thorities. Moreover, as a number of courts have recognized, through their ability to offer financial resources, knowledge of the plant, expertise and the moral support of their members, unions can contribute immeasurably to the effectiveness of fair employment litigation. See *International Woodworkers of America* v. *Georgia-Pacific Corp., supra,* 568 F.2d at 67 ("The financial backing and legal expertise that unions can provide would materially advance the type of private enforcement essential to the effectiveness of Title VII."); *Local 194* v. *Standard Brands, Inc., supra,* 540 F.2d at 866 ("The effectiveness of these suits can be increased by allowing unions to place their financial resources and expertise behind the suit."); *I.U.E.* v. *Westinghouse Electric Corp., supra,* 73 F.R.D. at 59 (" . . . the unions should remain as plaintiffs so that the individual employees in vindicating their civil rights may utilize the expertise and financial support of their unions . . .").

In every major case filed by IUE, the employer has counter-claimed for contribution. See, e.g., *Lynch* v. *Sperry Rand Corp.,* 62 F.R.D. 78 (S.D.N.Y. 1973); *Grogg* v. *General Motors Corp.,* 72 F.R.D. 523 (S.D.N.Y. 1976); *I.U.E.* v. *Westinghouse Electric Corp.,* 73 F.R.D. 57 (W.D.N.Y. 1976); *I.U.E.* v. *Westinghouse Electric Corp.,* 17 FEP Cases 16 (N.D.W.Va. 1977). IUE has successfully resisted these claims on both factual and legal grounds. Nevertheless, in three major respects, recognition by this Court of an employer's right of contribution would have a deleterious effect on union efforts to enforce or suppress the enforcement of fair employment laws.

First, there is the prospect of a union's enforcement efforts resulting in financial liability. This is true even of a union that has always acted in complete good faith, as back pay liability under Title VII can be imposed regardless of good faith. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975). Moreover, some courts have held unions liable under Title VII merely for signing an agreement with a

discriminatory term, although the union opposed the adoption of the term, e.g., *Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 270 (4th Cir. 1976), and although the provision was discriminatory because of prior unilateral discrimination by the employer. E.g., *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1381-82 (5th Cir. 1974); *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973). And even where unions knowingly participated in discrimination, they may now, because of a change of leadership, a change of philosophy or even to avoid potential liability, want to take action to expose discrimination and seek its redress. As frequently this is the most likely, if not the only, maner in which the discrimination will be redressed, this action should be encouraged. If enforcement efforts can be the precipitant of union liability, they will be discouraged.

Second, apart from the prospect of union liability, recognition of a right to contribution would seriously impair unions' effectiveness in prosecuting fair employment actions. A claim for contribution provides a tactical weapon which employers regularly use to delay the litigation and increase its cost. It makes it more difficult for a union to assist individual plaintiffs, and may make it impossible for the litigation to go forward. Thus, where unions join in Title VII actions as named plaintiffs with their members, the mere assertion by the employer of a right to contribution against them creates a potential conflict of interest which may prevent union counsel from also representing the aggrieved employees. See *Lynch* v. *Sperry Rand Corp.*, *supra*, 62 F.R.D. at 84-85; *Grogg* v. *General Motors Corp.*, *supra*, 72 F.R.D. at 529-30. In order to include individual plaintiffs in the action and for it to be maintained as a class action under Rule 23, a claim for contribution necessitates the individuals' finding and retaining independent, qualified counsel who is willing to handle complex litigation for many years, usually without reimbursement of expenses and for only a contingent fee. Thus, a right of contribution

undercuts a major value of union Title VII enforcement—the provision of paid counsel to represent the interests of the aggrieved employees in the litigation.[10]

Moreover, even where separate counsel are available to work on a contingent basis, the claim for contribution continues to be an impediment to union enforcement efforts. In one IUE case, the potential conflict of interest created by the employer's contribution claim has been held to restrict cooperative efforts between counsel for union plaintiffs and counsel for individual plaintiffs, necessitating independent discovery, briefing, etc. *I.U.E.* v. *Westinghouse Electric Corp., supra,* 17 FEP Cases at 18. These conflicts would similarly arise where the union is not named as a plaintiff but is supporting the employees' action through the provision of counsel or other financial support.

Third, recognition of a right of contribution would undercut union support of Title VII actions brought against employers by individual or government plaintiffs. The EEOC, for example, regularly joins unions as defendants in Title VII actions under Rule 19(a) where the unions were not named in the underlying charge of discrimination. It

---

[10] This problem is illustrated by recent IUE litigation involving General Electric Company. In June, 1978, IUE Local 201 and a number of individual employees filed actions under Title VII and the Equal Pay Act in the United States District Court for the District of Massachusetts alleging discrimination against female employees in wage, promotions and other practices at four GE plants in the Boston area. *IUE Local 201* v. *General Electric Co.*, C.A. No. 78-1045-Mc; *Krikorian* v. *General Electric Co.*, C.A. No. 78-1444-Mc. Attorneys retained by the union plaintiffs appeared on behalf of both the union and individual plaintiffs. However, GE filed contribution claims in both actions and then moved to disqualify union counsel from representing the *Krikorian* plaintiffs on the grounds of conflict of interest. In order to avoid lengthy proceedings on the representation question, union counsel withdrew as counsel for the individual plaintiffs, and the individuals were forced to locate new counsel.

has been uniformly held that unions joined in this manner may not be held liable for damages, since as to them the jurisdictional prerequisites of Title VII have not been met. See, e.g., *E.E.O.C.* v. *MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 (6th Cir. 1974). In such cases, IUE regularly lends its support to the EEOC by moving to realign as a plaintiff, e.g., *E.E.O.C.* v. *Chrysler Corp.*, 8 FEP Cases 343 (S.D. Ohio 1974), or where realignment is not allowed by filing crossclaims of discrimination against the employer, e.g., *E.E.O.C.* v. *Chrysler Corp.*, No. 78-3394 (6th Cir. May 16, 1980), petition for certiorari pending, No. 80-221 (O.T. 1980). Similarly, IUE often supports the efforts of individual employees by moving to intervene as a plaintiff in private Title VII actions. E.g., *Henry* v. *Westinghouse Electric Corp.*, 13 FEP Cases 799 (S.D. Ind. 1976); *Guy* v. *Robbins & Myers, Inc.*, 525 F.2d 124, 126 (6th Cir. 1975), *aff'd sub nom I.U.E.* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976). If an employer were permitted to obtain contribution against the union, the union would be encouraged to aid in the defense of the action, not in its prosecution.

After a two year study of the relationship between Title VII objectives and collective bargaining, the EEOC recently adopted a policy recognizing and encouraging the good faith efforts of unions to end discrimination. EEOC, Background Paper And Resolution To Encourage Voluntary Affirmative Action In Collective Bargaining, reprinted in BNA, Daily Labor Report (April 2, 1980), p. D-1. The EEOC resolved to modify its own administrative and litigation practices in cases where unions are involved in order to encourage greater enforcement effort by unions. The EEOC's action recognizes the important contribution that unions can make to the enforcement of the federal fair employment laws.[11] The common law right to con-

---

[11] In its statement, the EEOC relied expressly on the litigation efforts of the IUE as support for its position.

tribution which Northwest urges this Court to create would significantly reduce the likelihood that unions will serve this valuable purpose.[12]

II. Creation of a Right to Contribution Will Upset the Delicate Balance Regarding Unions Established by Congress in Title VII.

The right of contribution which Northwest requests this Court to recognize is not found in the language or legislative intent of Title VII or the Equal Pay Act. Employers' contribution against unions is inconsistent with the en-

---

[12] In addition to the negative consequences for Title VII enforcement, discouragement of union fair employment efforts runs counter to the policies of the National Labor Relations Act. If unions are inhibited from enforcing fair employment laws, women and minority employees will often take action independently. As this Court has recognized, the development of ad hoc splinter groups organized along sexual or racial lines to make demands on employers or seek recourse from administrative agencies or the courts, undermines the role of the union as the exclusive representative of the employees:

> [A union] has a legitimate interest in presenting a united front on [employment discrimination] as on other issues and in not seeing its strength dissipated and its stature denigrated by subgroups within the unit separately pursuing what they see as separate interests.

Emporium Capwell Co. v. *Western Addition Comm. Org.*, 420 U.S. 50, 70 (1975). Similarly, discrimination on the basis of sex or race in working conditions "sets up an unjustified clash of interests between groups of workers which tends to reduce the likelihood and the effectiveness of their working in concert to achieve their legitimate goals under the Act. . . ." *United Packinghouse, Food & Allied Workers, Int. Union* v. *N.L.R.B.*, 416 F.2d 1126, 1135 (D.C. Cir. 1969) (Wright, J.). The point is not that protected *employees* may not take their own actions to enforce the federal fair employment laws, for they obviously can; the point is that contribution gives *employers* the opportunity to interfere with the legitimate representative function of unions in assisting and supporting employees' enforcement efforts.

forcement scheme contained in these statutes. See Brief Amicus Curiae of AFL-CIO. In particular, Congress has struck a careful balance regarding the effect of the fair employment laws on unions by making them liable under Title VII directly to employees for their unlawful acts, while at the same time encouraging unions to take action to enforce the law. As IUE's experience demonstrates, see *supra*, pp. 14-17, contribution upsets this balance by allowing employers to interfere with unions' good faith efforts to redress discrimination against their members.

CONCLUSION

For the foregoing reasons, this Court should not create a right to contribution against unions in fair employment cases.

Respectfully submitted,

WINN I. NEWMAN
CAROLE WILSON
1126 Sixteenth Street, N.W.
Washington, D.C. 20036

RICHARD B. SOBOL
MICHAEL B. TRISTER
ANN H. FRANKE
Sobol & Trister
910 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 223-5022

Attorneys for Amicus Curiae

October 25, 1980

MOTION FILED
OCT 23 1980

No. 79-1056

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NORTHWEST AIRLINES, INC., *Petitioner*,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

AND

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF FOR MARY P. LAFFEY, *et al.*, AS *AMICI CURIAE*

MICHAEL H. GOTTESMAN*
ROBERT M. WEINBERG

Bredhoff, Gottesman, Cohen,
Chanin, Weinberg & Petramalo
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340

Attorneys for Amici Curiae

* Counsel of Record

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

Page

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* i

INTEREST OF THE *AMICI CURIAE* 1

ARGUMENT 2

I. There Is No Occasion for This Court to Discuss or Characterize the *Laffey* Findings in Its Opinion in the Instant Case, and It Should Refrain From Doing So 2

II. Northwest's Recitation of the Findings in *Laffey* Is Inaccurate 4

CONCLUSION 9

TABLE OF AUTHORITIES

Laffey, et al. v. Northwest Airlines, Inc., 366 F.Supp. 763 (D.D.C. 1973) and 374 F.Supp. 1382 (D.D.C. 1974), *affirmed in part, vacated in part and remanded,* 567 F.2d 429 (D.C. 1976), *cert. denied* 434 U.S. 1086 (1978) ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1056

NORTHWEST AIRLINES, INC., *Petitioner,*

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

AND

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Mary P. Laffey, *et al.*[1] move for leave to file the attached brief as *amici curiae.*[2]

---

[1] The other movants are: Mary Louise Ayres, Diane B. Backovich, Nancy J. Bates, Alta Mae (Smith) Christ, Rhea Dow, Beverly A. Emge, Susan F. Gerde, Mary Patricia Gleason, Dona M. Hall, Viona S. Hamilton, Myrna Lee (Olson) Hedgren, Peggy M. Helme, Judi Neu Jochimsen, Celestine Johnson, Katherine T. Keane, Suzanne P. Kress, Margaret J. Laffey, Abby Lanman, Shirley Linburgh, Barbara E. Manrow, Alice C. McCabe, Patricia McFarland, Mary C. Moxness, Janet M. Pegg, Susan M. Pupera, Carol Raschke, Angelica H. Renner, Virginia (Donohue) Rose, Marygale (Martin) Rosenberg, Rosemary M. Ruff, Mary Ann Schaak, Goldie K. (Chun) Shannon, Georgia Simpson, Iris Smith, Janet Smith, Jemine Smith, Elizabeth Stewart, Gayle Sturgis, and Connie Walker.

[2] Respondents consented to the filing of this brief, but as explained in ¶ 4, *infra*, petitioner refused to consent.

1. Movants are the original 40 plaintiffs in *Laffey, et al.* v. *Northwest Airlines, Inc.*[3] They are also the representatives of the Title VII class certified in *Laffey*.

2. The instant lawsuit involves a quest by Northwest Airlines, the defendant in *Laffey,* for contribution from two unions for part of the backpay assessed against Northwest in *Laffey*. Movants have no stake in the outcome of the instant lawsuit, nor do they wish to state any view on the legal issues before this Court. Rather, movants wish to file the attached brief for a very limited purpose. In its brief to this Court, Northwest purports to recite, as "background," certain of the "findings of the district court" in *Laffey*. (NWA Brief, p. 2 n. 2). Northwest then proceeds for three pages to furnish an inaccurate recitation of the findings in *Laffey*. (*Id.* pp. 3-5). That recitation is wholly irrelevant to the legal issues before this Court. Northwest did not see fit to refer to these findings in its complaint herein (J.A. 15-23), and in any event the findings in *Laffey* would not be binding upon defendants in the instant lawsuit. Were this Court, in its opinion in the instant case, inadvertently to characterize the findings in *Laffey* in the inaccurate fashion proffered by Northwest, that characterization would not, in a legal sense, be "binding" upon movants or upon the lower courts in which aspects of the *Laffey* case are still being litigated. Nevertheless, as a practical matter, a declaration by this Court as to what was "found" in *Laffey* might weigh heavily with the lower courts and thus influence the further prosecu-

---

[3] 366 F.Supp. 763 (D.D.C. 1973) and 374 F.Supp. 1382 (D.D.C. 1974), *affirmed in part, vacated in part and remanded,* 567 F.2d 429 (D.C. 1976), *cert. denied* 434 U.S. 1086 (1978).

tion of the *Laffey* case. For this reason, movants have an interest in filing the attached brief.

3. The attached brief makes two points: (1) that there is no occasion for this Court in its opinion herein to characterize the findings in *Laffey,* and accordingly this Court should refrain from doing so; and (2) that, if this Court determines that it *will* characterize the findings in *Laffey*, it should have before it a correct description of those findings (which we furnish) and not an inaccurate description such as appears in Northwest's brief.

4. On October 9, 1980 we wrote to counsel for all parties in the instant case requesting their consent to the filing of this *amici curiae* brief. A copy of this letter is reprinted as Appendix A *infra.* Our letter explained the purpose of our proposed *amici* brief as follows:

> The brief we would file (if we decide to file) would not discuss any of the legal issues before the Court in this case. Rather, its sole function would be to apprise the Court of our disagreement with Northwest's characterization of the findings in *Laffey* and of the evidence which underlies those findings. Our brief would urge the Court to refrain from characterizing the findings and evidence in *Laffey,* and would recite our view respecting the findings and evidence in the event that the Court determines that it *will* refer to them in its opinion.

Counsel for both respondents herein consented. However, by letter of October 14, 1980 (reprinted as Appendix B) counsel for Northwest refused consent, explaining:

> After consideration of the reasons expressed in your letter for the filing of such a brief, it is

Northwest's position that an *amici* brief is neither warranted nor timely and that your proposed brief would not contribute anything to the Court's resolution of the legal issues that are before it in the *Transport Workers Union* case.

5. Movants have no reason to expect that either of the respondents will make the points contained in the attached brief.

6. While the attached brief does not support any party, it could not have been filed within the time allowed for filing petitioner's brief, as contemplated by this Court's rule 36(2), as it was not until the filing of petitioner's brief that the occasion for filing the attached brief (i.e. the need to respond to inaccurate statements in petitioner's brief respecting the *Laffey* findings) arose.

CONCLUSION

WHEREFORE, for the reasons set forth hereinabove, movants request that leave be granted to file the attached brief *amici curiae*.

Respectfully submitted,

MICHAEL H. GOTTESMAN
ROBERT M. WEINBERG

Bredhoff, Gottesman, Cohen,
Chanin, Weinberg & Petramalo
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340

Attorneys for Amici Curiae

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1056

NORTHWEST AIRLINES, INC., *Petitioner,*

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

AND

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR MARY P. LAFFEY, *et al.* AS *AMICI CURIAE*

INTEREST OF THE *AMICI CURIAE*

As more fully explained in the motion for leave to file this brief, *amici* are the original plaintiffs and the representatives of the Title VII class in *Laffey* v. *Northwest Airlines, Inc.*, the lawsuit whose backpay award is the occasion for Northwest's quest in the instant suit for contribution from the respondent unions.

Amici have no stake in the outcome of the instant suit, nor in the resolution of the legal issues now before this Court, and they do not desire to state a view on those issues. However, Northwest's brief contains three pages purporting to characterize the findings in *Laffey,* obstensibly "to provide background" (NWA Brief, p. 2 n. 2), and that recitation misstates what was found by the courts in *Laffey. Amici* are concerned that that recitation, if not corrected, might induce this Court in its opinion herein to characterize the *Laffey* findings inaccurately; and, as aspects of the *Laffey* litigation are still ongoing in the lower courts, *amici* fear that such an inaccurate characterization of the *Laffey* findings by this Court might weigh heavily with the lower courts and thus influence the further prosecution of the *Laffey* case. Accordingly, *amici* file this brief (1) to show that there is no occasion for this Court to discuss the *Laffey* findings in its opinion in the instant case, and (2) in the event the Court determines that it *will* discuss those findings in its opinion, to correct Northwest's inaccurate description thereof so that the Court's opinion will not contain such inaccuracies.

ARGUMENT

I. There Is No Occasion for This Court to Discuss or Characterize the *Laffey* Findings in Its Opinion in the Instant Case, and It Should Refrain From Doing So.

The instant case is before this Court on review of rulings on motions to dismiss. The issues which this Court has granted certiorari to decide are pure issues of law, involving the availability *vel non* of contribution under the Equal Pay Act and Title VII, which do not depend in any respect upon the findings which were

made respecting the merits in the *Laffey* case. There is, accordingly, no imperative for this Court, in its opinion in the instant case, to describe the evidentiary findings upon which the courts in *Laffey* based their conclusions that Northwest violated Title VII and the Equal Pay Act. Northwest did not deem those findings pertinent to the complaint which it filed in the instant case (J.A. 15-23), and in refusing consent to the filing of this *amici* brief Northwest's counsel stated that our expressed desire to submit a correct version of the findings in *Laffey* "would not contribute anything to the Court's resolution of the legal issues that are before it in the [instant] case." (See *App.* B., *infra*).

We quite agree with Northwest's counsel that the findings in *Laffey* are not material "to the Court's resolution of the legal issues that are before it in the [instant] case." It is, accordingly, a mystery to us why Northwest saw fit to devote three pages of its brief herein to a purported description of those findings (NWA Br. 3-5). But the fact is that Northwest did so, and that its description misstates what was found by the courts in *Laffey* (see Part II, *infra*). And, whatever may have motivated Northwest, the adoption in this Court's opinion of that inaccurate recitation, while seemingly diminishing Northwest's ultimate chances of securing contribution from the respondent unions,[1] might disadvantage the *Laffey*

[1] If Northwest establishes herein its legal right to pursue a contribution claim against respondent unions, in order to recover ultimately on that claim it will have to prove that those unions violated Title VII and/or the Equal Pay Act. Northwest's depiction of the *Laffey* findings, by incorrectly suggesting that the courts in *Laffey* found substantial differences between the purser and stewardesses positions, might, if embraced by this Court in its opinion, lessen Northwest's chances of prevailing on its claim that those unions violated either statute.

plaintiffs with respect to the resolution of aspects of the *Laffey* case still being litigated in the lower courts (see Motion, *supra,* pp. ii-iii).

Accordingly, we urge this Court to refrain in its opinion herein from describing or characterizing the evidentiary findings in *Laffey,* lest that characterization inadvertently have an effect upon the further litigation in *Laffey* itself. However, on the chance that this Court may decide to describe the *Laffey* findings in its opinion herein, we proceed to correct the inaccuracies in Northwest's recitation of those findings.

II. Northwest's Recitation of the Findings in *Laffey* Is Inaccurate

Northwest's recitation of the findings in *Laffey* suggests that the courts in *Laffey* found: (1) that Northwest regularly employed male flight service attendants (FSA's) at the same rate of pay as stewardesses (NWA Br. 3); (2) that the higher rate for the classification of purser was initially established through collective bargaining (*Id.* 4); (3) that the differential was maintained thereafter because the company and union agreed that the purser classification entailed "extra duties and supervisory responsibilities" not borne by stewardesses (*id.* 3, 4-5); (4) that in fact pursers were assigned such extra duties and supervisory responsibilities (*id.* 3-5); (5) that Northwest stopped limiting the purser classification to men "shortly after Title VII took effect, when a new contract was signed in 1966" (*id.* 3); and (6) that Northwest had behaved entirely reasonably in paying stewardesses less than pursers (*id.* 4). In fact, the *Laffey* courts made none of these findings; indeed, in most instances they made the opposite finding.

1. The district court did *not* find that Northwest regularly employed men as FSA's at the same rate of pay as stewardesses. On the contrary, the court found that Northwest hired male FSA's only to man a particular aircraft—the Boeing Stratocruiser—which was used only from 1949 until 1957 (366 F.Supp. at 766, ¶ 12).[2] Northwest stopped hiring FSA's in 1957, "the discontinued use of the Boeing Stratocruiser having eliminated the Company's interest in having FSA's" (*Id.* at 767, ¶ 17). Thereafter, the incumbent FSA's were promoted to the purser classification as vacancies arose; by 1965, there were only three FSA's left; and by 1970, when the EEOC charges were filed in *Laffey*, there were none (*Id.* at 767, ¶¶ 17, 19). By the latter date, Northwest employed 137 male cabin attendants, all classified and paid as pursers, and 1,747 female cabin attendants, all but one classified and paid as stewardesses (*id.* at 767, ¶ 19). Between 1965 and 1970, Northwest had hired 118 new male cabin attendants, all as pursers, and 2,224 new female cabin attendants, all as stewardesses (*id.* at 767, ¶ 20).

2. The district court did not find, as Northwest asserts in its brief, that the higher pay for pursers was "established" in collective bargaining (NWA Br. 4). The district court found that the purser classification was created in 1947, but was not brought under the collective bargaining agreement until 1949 (*id.* at 766, ¶ 11). As the Court of Appeals in *Laffey* explained,

---

[2] These men were promised a right to fill purser vacancies as they arose (*id.* ¶ 14). As one company witness testified: "We do not hire flight service attendants and leave them in limbo without becoming pursers for an indefinite period of time." Appendix in *Laffey* v. *Northwest Airlines, Inc.*, Nos. 74-1791, 75-1334 (C.A. D.C.), p. 836.

when the purser classification was brought under the collective bargaining agreement Northwest "had already created a *status quo* under which pursers were more highly paid than stewardesses" (567 F.2d at 447).

3. The district court in *Laffey* made no finding as to the dynamics which caused continuance of the wage differential thereafter, and most assuredly did not find that "the union demanded continuation of the differential" (NWA Br. 5).[3] The finding to which Northwest cites (366 F.Supp. 767-768, ¶ 23) is that the union rejected Northwest's proposal to reduce the purser salary to the stewardess level; there is no finding, and no evidence in *Laffey,* that the union opposed what the Equal Pay Act required (567 F.2d at 457, n. 189), i.e. raising the stewardesses' salary to the purser level. There is likewise no evidence in the *Laffey* record, and no finding, that the union, either separately or together with Northwest, ever addressed the issue whether a pay differential between pursers and stewardesses was justified by any differences in duties or responsibilities, and Northwest so admitted in a brief to the Court of Appeals in *Laffey.*[4] The lower courts both found

---

[3] The respective roles of Northwest and the unions, as they bear upon the reasonableness and good faith of Northwest's behavior, are caught up in the liquidated damages issue in *Laffey,* which remains *sub judice* by virtue of the Court of Appeals' reversal of the district court's initial denial of liquidated damages and remand for reconsideration thereof. 567 F.2d at 463-466.

[4] In its opening brief to the Court of Appeals in *Laffey,* pp. 27, 37, Northwest asserted that the company and the union had "evaluated" the positions and, having "freely agreed that the positions of purser and those of cabin attendants were not substantially identical or equal," established a "bona fide, collectively bargained job evaluation system" paying pursers more than stewardesses. We

that Northwest had continually rebuffed the union's efforts to narrow the wage disparity between stewardesses and pursers (366 F.Supp. at 778, 786, ¶ 45, 70; 567 F.2d at 447), and the Court of Appeals expressly rejected Northwest's argument that in inference could be drawn from the simple fact that "collective bargaining produced unequal rates" (n. 4, *supra*) that the union thought the pursers had duties and/or responsibilities not shared by stewardesses (567 F.2d at 446-447).

4. The district court in *Laffey* found that in fact pursers were *not* assigned extra duties and supervisory responsibilities. With respect to extra duties, the court found that every duty which Northwest contended was uniquely assigned to pursers in fact was assigned to stewardesses as well (366 F.Supp. at 779-785, 786-787, ¶¶ 51-64, 71-73). As for supervisory responsibilities, the district court found that neither pursers nor stewardesses were supervisors, and that the responsibilities which Northwest called "supervisory" were assigned to stewardesses as well as pursers (*id.* at 785-786, ¶¶ 65-69).

---

responded that "there is not one word of record evidence indicating Northwest and the union ever compared the duties of the jobs and/or their relative worth, let alone established a job evaluation system"; that "this record does not show any union 'evaluation' of the comparative duties of the job, nor any 'agreement' that their duties warrant different pay." Brief for Plaintiffs, pp. 5, 45. In its reply brief, Northwest conceded this, but argued that the Court could infer these facts from the single fact that "collective bargaining produced unequal rates." Appellant's Combined Reply Brief and Brief on Cross-Appeal, p. 5. The union "must have evaluated the jobs . . . [T]he parties necessarily engaged in a comparison of job values. No evidence suggests the contrary . . . The only possible conclusion is that the parties were engaged in bona fide job evaluation." *Id.*, pp. 5-6.

5. Northwest did *not* stop its discrimination against women in filling purser positions in 1966 "shortly after Title VII took effect" (NWA Br. 3). On the contrary, the district court found—and Northwest did not appeal the finding—a consistent and intentional pattern of discrimination which continued right up to the date of trial denying women access to the higher pay scale enjoyed by the men (366 F.Supp. at 768-773, ¶¶ 24-38). By the time of the district court's decision, in 1973, only one woman had ever become a purser (*id.* at 770-771, ¶¶ 31, 35), and she only because she refused to succumb to Northwest's elaborate efforts to prevent her doing so (*id.* at 769-770, ¶¶ 28-31). And discrimination in filling the purser classification was but one component of a widespread pattern of sex discrimination continuing up to the date of trial found by the district court (*id.* at 773-775, ¶ 39).

6. The implication in Northwest's brief (p. 4) that its paying stewardesses less than men was found somehow "reasonable" (albeit unlawful) by the courts in *Laffey* (NWA Br. 4) is not accurate. As the Court of Appeals recognized, the district court's findings establish that Northwest was motivated by sex in paying stewardesses less than pursers (567 F.2d at 450-451). The passage of the district court's memorandum opinion which Northwest quotes at page 4 of its brief was with respect to an issue on which that court was reversed by the Court of Appeals (567 F.2d at 463-466).[5]

---

[5] Northwest speculates in its brief as to why plaintiffs did not name Transport Workers Union as a defendant in *Laffey* (NWA Br. 5). There is nothing in the *Laffey* record to support this speculation, nor did Northwest's complaint in the instant case contain an allegation on this point which must be assumed to be true in the present posture of this case (see J.A. 15-22). It would be as

CONCLUSION

For the reasons set forth above, this Court should not, in its opinion in this case, describe or characterize the findings of the courts in *Laffey*; alternatively, if this Court determines that it will describe or characterize those findings, it should not accept the inaccurate recitation thereof contained in Northwest's brief.

Respectfully submitted,

MICHAEL H. GOTTESMAN
ROBERT M. WEINBERG

Bredhoff, Gottesman, Cohen,
Chanin, Weinberg & Petramalo
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340

Attorneys for Amici Curiae

---

inappropriate for us to furnish the reason for plaintiffs not suing TWU as it is for Northwest to speculate thereon. We simply note the Court of Appeals' observation in *Laffey* that "when the union did attempt to win better treatment for stewardesses, it encountered stiff resistance from NWA" (567 F.2d at 447), an observation amply supported by the district court's findings in *Laffey* (366 F.Supp. at 767-768, 778, 786; ¶¶ 22-24, 45, 70).

APPENDIX

APPENDIX A

BREDHOFF, GOTTESMAN, COHEN & WEINBERG

Attorneys and Counselors

1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Area Code 202
833-9340

October 9, 1980

Philip Lacovara, Esquire
Hughes, Hubbard & Reed
1660 L Street, N.W.
Washington, D.C. 20036

Steven Moldof, Esquire
Cohen, Weiss & Simon
605 Third Avenue
New York, New York 10016

Asher Schwartz, Esquire
O'Donnell & Schwartz
285 Madison Avenue
New York, New York 10017

Re: *Northwest Airlines* v. *TWU and ALPA*

Gentlemen:

As counsel for the plaintiffs in the *Laffey* case, we are presently considering the possibility of filing an *amicus curiae* brief in the Supreme Court in the above-captioned case. It will probably be several days before we make a final decision as to whether to file the brief, but in order to know whether we would need to accompany such a brief with a motion for leave to file, it is necessary that we ascertain now (even though our decision is not final) whether you will consent to the filing of such a brief.

The brief we would file (if we decide to file) would not discuss any of the legal issues before the Court in this case. Rather, its sole function would be to apprise the Court of our disagreement with Northwest's characterization of the findings in *Laffey* and of the evidence which underlies those findings. Our brief would urge the Court to refrain from characterizing the findings and evidence in *Laffey,* and would recite our view respecting the findings and evidence in the event that the Court determines that it *will* refer to them in its opinion.

It is critical that we know by Tuesday, October 14, whether all parties will consent to the filing of an *amicus* brief, for if even one party will not consent it will be necessary that we prepare and print a motion for leave to file. Accordingly, I would very much appreciate each of you letting me know by Tuesday whether you will consent.

If you *are* willing to consent, I would appreciate your sending a letter to me in the form of the attached.

Many thanks for your cooperation.

Sincerely,

/s/ MICHAEL H. GOTTESMAN
Michael H. Gottesman

[Enclosure not reprinted]

APPENDIX B

Hughes Hubbard & Reed
1660 L Street, N.W.
Washington, D.C. 20036

TELEPHONE: 202-862-7400
TELEX: 89-2874

October 14, 1980

BY HAND

Michael H. Gottesman, Esquire

Bredhoff, Gottesman, Cohen, Chanin,
Weinberg & Petramalo
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: *Northwest Airlines* v. *TWU and ALPA*
(No. 79-1056)

Dear Mr. Gottesman:

I have your letter of October 9 asking whether Northwest Airlines, as petitioner in the above-captioned case, would consent to your filing of a brief on behalf of the plaintiffs in the *Laffey* case as *amici curiae*. After consideration of the reasons expressed in your letter for the filing of such a brief, it is Northwest's position that an *amici* brief is neither warranted nor timely and that your proposed brief would not contribute anything to the Court's resolution of the legal issues that are before it in the *Transport Workers Union* case.

Accordingly, Northwest does not consent to your filing of such a brief.

Sincerely,

/s /PHILIP A. LACOVARA
Philip A. Lacovara

MOTION FILED
SEP 4 1980

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1980

No. 79-1056

NORTHWEST AIRLINES, INC.,
Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,
and
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

MOTION FOR LEAVE TO SUBMIT A BRIEF AS *AMICUS CURIAE*
and
BRIEF *AMICUS CURIAE* OF TRANS WORLD AIRLINES, INC.

HERBERT PRASHKER
POLETTI FREIDIN PRASHKER
FELDMAN & GARTNER
1185 Avenue of the Americas
New York, New York 10036
Tel: (212) 730-7373
Attorney for Trans World Airlines, Inc.

Of Counsel:

POLETTI FREIDIN PRASHKER
FELDMAN & GARTNER

PEYTON H. MOSS
ERIC D. WITKIN

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1980

No. 79-1056

NORTHWEST AIRLINES, INC.,
Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

and

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

MOTION FOR LEAVE TO SUBMIT A BRIEF AS *Amicus Curiae*

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States

Pursuant to Rule 36 of this Court, Trans World Airlines, Inc. (TWA) respectfully moves this Court for leave to file the

accompanying brief as *amicus curiae* in support of the position of the petitioner, Northwest Airlines, Inc. (NWA) in this case. In support of its motion, TWA shows as follows:

1. This motion for leave to file is necessary under Rule 36(3) as counsel for respondent, Transport Workers Union of America, AFL-CIO, has advised that consent for the filing of this brief would not be granted. Because TWA has a direct stake in the outcome of the contribution issue, counsel for the petitioner has given his consent and will be filing a letter to that effect with the Clerk of the Court.

2. TWA is an international and domestic United States carrier by air subject to the provisions of the Railway Labor Act, 45 U.S.C. § 181 *et seq.* Among its approximately 32,300 employees are flight attendants who, from 1947 to date, have been represented for collective bargaining purposes by several labor organizations, including the Transport Workers Union of America (TWU), one of the respondents on this appeal. Like other international air carriers, TWA has long employed separate classes of flight attendants, *viz.* Pursers and Cabin Attendants, on its international flights; Pursers are not employed on TWA's domestic flights. Pursers have been paid at a higher rate than Cabin Attendants pursuant to union contracts, because, as asserted by TWA and the unions, they have additional duties and responsibilities. Between 1947 and 1967, the Purser category on TWA was all male and the Cabin Attendant category all female. In August 1967, the Purser position was opened to females; as of the present time, females fill approximately half of TWA's Purser positions, and TWA employs both male and female Cabin Attendants.

3. In 1970, a group of female TWA flight attendants commenced an action against TWA in the United States District Court for the Southern District of New York [*Maguire, et al.* v. *Trans World Airlines, Inc., et al.,* 70 Civ. 3947] alleging, among other things, that the salary differential between Pursers and Cabin Attendants violated both Title VII of the Civil Rights Act of 1964 (Title VII) and the Equal Pay Act

of 1963 because, they alleged, the jobs in fact involved equal work, skill, effort and responsibility and the salary differential between the two jobs was based upon sex. While Air Line Stewards and Stewardesses Association, Local 550, Transport Workers Union of America, AFL-CIO (TWU Local 550), then representing all TWA's flight attendants, was initially permitted to join the action as a plaintiff, TWA eventually forced its realignment as a defendant, and secured the joinder as defendants of its parent union, Transport Workers Union of America, AFL-CIO (TWU) and Local 550's successor, TWU Local 551. TWA and the defendant unions asserted that the salary differentials between the Pursers and Cabin Attendants are based upon differences in job duties and not sex. TWA further alleged that the pay differential between the Purser and Cabin Attendant jobs was insisted on by the defendant unions at the urging of TWA's largely female complement of Flight Attendants. The case was tried on the merits under the Equal Pay Act after interlocutory dismissal of the Title VII claims on jurisdictional grounds, and is awaiting decision. Should the merits be decided against TWA, the district court will be required to address TWA's claim against the flight attendant unions for contribution to TWA for a portion of any damages assessed against TWA attributable to those unions because of their actions in causing or attempting to cause TWA to maintain and increase the challenged wage differential in violation of Section 206(d)(2) of the Equal Pay Act.

4. The first two issues here presented (see Petition for Certiorari herein, p. 2) are identical to issues of contribution presented in *Maguire*. TWA is interested in a resolution of these issues favorable to the existence of a right to contribution.

5. Because the *Northwest* case comes before this Court as a result of motions to dismiss the complaint, the record is restricted to the pleadings and the decisions below. TWA is able to supply to this Court facts based on uncontradicted portions of the record evidence in *Maguire* which illuminate the practical equities favoring recognition of a legal principle of

contribution in cases of joint union-employer action violative of the Equal Pay Act and/or Title VII.

WHEREFORE, TWA respectfully requests that it be granted leave to submit the accompanying brief as *amicus curiae* in this case.

Dated: New York, New York
August 30, 1980

Respectfully submitted,

HERBERT PRASHKER

Attorney for Trans World Airlines, Inc.

Of Counsel:

POLETTI FREIDIN PRASHKER
FELDMAN & GARTNER

PEYTON H. MOSS
ERIC D. WITKIN

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

No. 79-1056

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

and

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF TRANS WORLD AIRLINES, INC.

HERBERT PRASHKER
POLETTI FREIDIN PRASHKER
FELDMAN & GARTNER
1185 Avenue of the Americas
New York, New York 10036
Tel: (212) 730-7373
Attorney for Trans World Airlines, Inc.

Of Counsel:

POLETTI FREIDIN PRASHKER
FELDMAN & GARTNER

PEYTON H. MOSS
ERIC D. WITKIN

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	
I. TWA'S DOCUMENTED EXPERIENCE ILLUSTRATES THE EQUITY OF AND THE NECESSITY FOR RECOGNIZING AN EMPLOYER RIGHT TO CONTRIBUTION FROM UNIONS WHERE MONETARY LIABILITY IS IMPOSED ON THE EMPLOYER UNDER THE EQUAL PAY ACT AND/OR TITLE VII	5
II. UNIONS WERE RESPONSIBLE IN DAMAGES TO EMPLOYEES FOR DISCRIMINATORY CONTRACTS UNDER THE FEDERAL LABOR STATUTES BEFORE THE EQUAL PAY AND CIVIL RIGHTS ACTS WERE PASSED; THOSE STATUTES DID NOT ELIMINATE THAT LIABILITY; NO INFERENCE CAN BE DRAWN OF A CONGRESSIONAL PURPOSE IN ENACTING THE LATER STATUTES TO INSULATE UNIONS FROM PRE-EXISTING LIABILITY FOR SUCH CONDUCT	10
CONCLUSION	14

TABLE OF CASES AND AUTHORITIES

	Page
Cases	
Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952)	11
Central of Georgia Ry v. Jones, 229 F. 2d 648 (5th Cir. 1956)	4, 11
Conley v. Gobson, 355 U.S. 41 (1957)	11
Graham v. Brotherhood of Locomotive Firemen & Enginemen, 388 U.S. 232 (1949)	11
Glover v. S.L.-S.F.Ry. Co., 393 U.S. 324 (1969)	11
International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42 (1979)	11
Laffey v. Northwest Airlines, Inc., 366 F. Supp. 763 (D.D.C. 1973), 374 F. Supp. 1382 (D.D.C. 1974), *aff'd in part, vacated in part, and remanded*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978)	3
Maguire et al. v. Trans World Airlines, Inc., et al., 70 Civ. 3947 (S.D.N.Y.)	2
Maguire v. Trans World Airlines, Inc., 403 F. Supp. 734 (S.D.N.Y. 1975)	5, 6, 9
Richardson v. Texas & N.O.R.R., 242 F.2d 230 (5th Cir. 1957)	11
Steele v. Louisville & Nashville Ry., 323 U.S. 192 (1944)	4, 11
Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 338 U.S. 232 (1949)	11
Vaca v. Sypes., 386 U.S. 171 (1967)	11
Statutes	
Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(a)	9
§ 2000e-2(c)	9
§ 2000e-2(c)(3)	10
§ 2000e-5	13
Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1)	9
§ 206(d)(2)	9, 10
§ 216(c)	13

Page

Rules

U.S. Supreme Court Rule 36(3) 1

Miscellany

Cox, "The Duty of Fair Representation," 2 Villanova L. Rev. 151 (1957) 11

Sovern, *Legal Restraints on Racial Dicrimination in Employment* (Twentieth Century Fund, 1966) 4, 12

Wellington, *"Union Democracy and Fair Representation: Federal Responsibility in a Federal System"*, 67 Yale L.J. 1327 (1958) 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

No. 79-1056

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

and

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF TRANS WORLD AIRLINES, INC.,
Amicus Curiae

INTEREST OF THE *AMICUS CURIAE*

This brief is submitted pursuant to Rule 36(3) of this Court. Trans World Airlines, Inc. (TWA) has a substantial interest in the outcome of this case. TWA is a defendant in a

suit brought in 1970 under the Equal Pay Act of 1963 (Equal Pay Act) and Title VII of the Civil Rights Act of 1964 (Title VII) by a number of its female flight attendants who claimed that TWA violated those statutes by paying its then all-female Cabin Attendants, pursuant to provisions of collective bargaining agreements with the certified unions, a rate lower than that paid to its International Pursers, who at the time of the suit, were both male and female.[1] [*Maguire et al.* v. *Trans World Airlines, Inc., et al.*, 70 Civ. 3947 (S.D.N.Y.)]. By the time its action was tried, TWA had been employing male Cabin Attendants for a number of years, females already numbered some 40% of its Pursers, and the Purser pay differential required by TWA's successive agreements with the unions representing its flight attendants, had grown larger. During the trial, the District Court dismissed the Title VII claims on jurisdictional grounds (403 F. Supp. 734), completed the trial under the Equal Pay Act, and the cause is presently awaiting decision.

TWA had succeeded in joining the flight attendants' unions as co-defendants in the action prior to trial. Denying that the Purser pay differential was sex-based or unlawful, TWA also asserted cross-claims against those unions for damages, contribution, and indemnity in the event TWA was held liable in damages to the employees because of the pay differential which the unions had insisted on maintaining and increasing.

At trial, TWA, and the co-defendant unions, defended the action with evidence that the Purser and Cabin Attendant jobs did not require "equal skill, effort, and responsibility" within the meaning of the Equal Pay Act and that the salary differential they had contracted for was not in fact based on sex. TWA also introduced a considerable body of indisputable evidence—most of it documentary, stipulated to, or consisting of admissions by the plaintiffs and the defendant unions —demonstrating the responsibility of both the plaintiffs and the

---

[1]Both TWA's Cabin Attendants and Pursers have, for years now, been male and female, the females now numbering approximately half of the Pursers; the pay differential continues in effect.

unions for the differential claimed by the plaintiffs to be unlawful.

TWA obviously has a substantial interest in the outcome of Northwest's case: the decision of this Court in Northwest's case may influence the disposition of TWA's claim for contribution in its still pending case if TWA's Purser pay differential established by its union agreements is adjudged to have violated the Equal Pay Act. Moreover, we believe that TWA can furnish assistance to this Court in its disposition of Northwest's case. That case comes before this Court on a pleading, without trial of the facts relevant to Northwest's claim for contribution. While this Court must now accept as true Northwest's allegations that the defendant unions bear responsibility for the Northwest pay differential[2], we submit that uncontradicted evidence from the TWA case, in which the issue of union responsibility for a pay differential has been thoroughly tried, will illuminate, clarify, and dramatize for the Court the range of actual situations in which the legal issue of contribution arises, and will assist the Court in adjudicating that issue.

We will not attempt to re-cover matters already ably covered by the Petitioner's brief, except that we do offer a modest addition with respect to the legal framework within which Congress enacted the Equal Pay Act and Title VII.

---

[2]TWA understands that Northwest Airlines continues to contest the determination in *Laffey v. Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C. 1973) (findings of fact and conclusions of law), 374 F. Supp. 1382 (D.D.C. 1974) (order and supplemental memorandum), *aff'd in part, vacated in part, and remanded,* 567 F.2d 429 (D.C. Cir. 1976), *cert. denied,* 434 U.S. 1086 (1978), that Northwest's Purser differential constituted sex discrimination, and TWA believes that it has convincingly demonstrated in its own case, on a different record from Northwest's, that *its* Purser pay differential was not, in fact, based on sex and that it will not, accordingly, have to pursue its claim for contribution. That issue, of course, will be determined by the District Court.

SUMMARY OF ARGUMENT

I. TWA's documented experience illustrates the equity of and necessity for recognition of an employer right to contribution from a union party to a collective agreement where monetary liability is imposed on the employer under the Equal Pay Act or Title VII because of pay differentials required by the collective agreement.

II. In 1944, this Court, to avoid constitutional questions otherwise presented, held that Congress had impliedly created an employee right of action for damages for unfair representation under the Railway Labor Act against unions who negotiated contracts which unfairly discriminate against a class of employees they represent [(*Steele* v. *Louisville & Nashville Ry.*), 323 U.S. 192 (1944), discussed in M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 144-175 (Twentieth Century Fund, 1966)]. Before the Equal Pay Act or Title VII were enacted, damages were assessed against both employers and unions for discriminatory collective bargaining agreements violating the unions' duty of fair representation [*Central of Georgia Ry.* v. *Jones,* 229 F. 2d 648 (5th Cir. 1956)]. In *explicitly* prohibiting unions from entering into specified discriminatory collective bargaining agreements twenty years later in the Equal Pay Act and Title VII which provided new remedies against such conduct, Congress did not exempt those unions from damage liability to which they were already subject for just such discrimination or transfer the entire burden of the liability for such discrimination to the employers whom the unions had caused to discriminate.

ARGUMENT

I.

TWA'S DOCUMENTED EXPERIENCE ILLUSTRATES THE EQUITY OF AND THE NECESSITY FOR RECOGNIZING AN EMPLOYER RIGHT TO CONTRIBUTION FROM UNIONS WHERE MONETARY LIABILITY IS IMPOSED ON THE EMPLOYER UNDER THE EQUAL PAY ACT AND/OR TITLE VII.

Uncontroverted evidence adduced in the *Maguire* action illustrates the practical need to recognize a right to contribution under Title VII and the Equal Pay Act and the injustice of any contrary principle. Some of that evidence is related in a District Court opinion granting TWA's motion to dismiss the Title VII claims for lack of subject matter jurisdiction [*see Maguire* v. *Trans World Airlines, Inc.*, 403 F. Supp. 734 (S.D.N.Y. 1975)]. The rest of the story is found in other uncontradicted evidence in the trial record of that case.

In April 1968 Margaret Maguire, a female TWA cabin attendant, filed a Title VII charge with the EEOC against TWA, her employer, and her duly certified union, the Air Line Stewards and Stewardesses Association, Local 550, Transport Workers Union of America, AFL-CIO (TWU Local 550), (403 F. Supp. at 735-736)[3]. TWU Local 550 represented flight attendants on other airlines as well as TWA. Maguire's charge alleged, *inter alia,* that the higher-paid and largely male TWA Pursers did the same work as the lower-paid and then all female Cabin Attendants on TWA's international flights (*ibid.*). The separate Cabin Attendant and Purser pay rates were fixed by the collective agreement between TWA and TWU Local 550. In the same year she filed her charge, Maguire circulated a "Petition" addressed to TWU Local 550, ultimately signed by several hundred TWA female Cabin Attendants, entitled "Equal Pay for Equal Work," demanding that the union negotiate a pay differential for Pursers of $2.50

---

[3]"TWU Local 550" is referred to as "ALSSA" by the District Court.

per flight credit hour, or slightly more than the differential payable under the union contract then in effect, on the stated ground that the Purser job carried with it extra responsibilities and duties which warranted the extra pay (*see* 403 F. Supp. 736).

The EEOC found "reasonable cause" to believe that both TWA and TWU Local 550 were "jointly and severally" discriminating against Maguire in violation of Title VII (*id.* at 736). TWA declined EEOC conciliation of Maguire's charge (403 F. Supp. at 738-739), but TWU Local 550, which was then negotiating a new flight attendant contract with TWA (403 F. Supp. at 736, 741-742), offered to "conciliate" through its attorney, Mr. Gilbert Feldman (403 F. Supp. at 740-741). Maguire having become Secretary of TWU Local 550 (403 F. Supp. at 740), retained Feldman to represent *her* in her EEOC matter. At that time, TWU Local 550 was demanding in contract negotiations a *widening* of the very Purser-Cabin Attendant wage differential which Maguire and TWU Local 550's attorney, Feldman, would soon claim as unlawful. Maguire and Feldman arranged with the EEOC for the latter to delay issuance to Maguire of an EEOC Notice of Right to Sue until Feldman requested it, a device which Maguire testified was designed to allow her to obtain maximum advantage in her forthcoming suit from the then pending contract negotiations between TWA and TWU Local 550 (403 F. Supp. at 740-742, 746).[4] In September 1970, Maguire, with Feldman as her attorney, filed a suit against TWA, but not against TWU Local 550. charging that the pay differential was unlawful under both the Equal Pay Act and Title VII.

---

[4]Under the Equal Pay Act, the employee who, for unlawful reasons, is paid a rate lower than the higher rate paid to the favored class, is entitled to a judgment for the difference between the lower and higher rate. Accordingly, the higher Maguire's union negotiated the new Purser rate, the more valuable a judgment declaring that rate to be discriminatory would be to Maguire.

Soon after the suit was filed, TWA and TWU Local 550 agreed upon a new collective bargaining agreement which, in fact, somewhat widened the Purser pay differential attacked by the law suit. When TWA then moved to dismiss the action because the union had not been named as a party, TWU Local 550, with Feldman as its attorney, asked that it be permitted to intervene as a *plaintiff* attacking the wage differential it had just negotiated. The application was granted over TWA's objection. TWA thereupon counterclaimed against TWU Local 550 for contribution in the event TWA was held liable for damages. There matters stood until 1973.

By the next round of TWA-TWU contract negotiations (in 1972-1973), plaintiff Maguire had herself become a Purser and Chairman of TWU Local 550's Master Executive Council on TWA; in those negotiations, TWU Local 550 demanded, *at the bargaining table,* a further widening of the Purser-Cabin Attendant differential which, by this time, the union and its TWA Master Executive Council Chairman were both alleging, *in court,* to be unlawful. TWA, insisting that the differential was lawful, nevertheless resisted the union effort to widen it, initially taking the position that it should be reduced if the union was claiming that it was unlawful. TWU Local 550 persisted, however, in demanding an across the board percentage wage increase which would widen the dollar pay differential by the same percentage. TWA next took the position that it would agree only to increases of the same dollar amounts for Pursers and Cabin Attendants, in order not to increase the *dollar amount* of the pay differential and thus increase the rate of accrual of additional potential liability in the suit. There ensued a seven weeks' strike conducted by TWU Local 550 and its parent international, the Transport Workers Union of America, AFL-CIO (TWU) over that and other issues. It ended only when TWA yielded to TWU Local 550's and TWU's demands that the Purser salary differential be expanded by an across the

board percentage pay increase for all categories.[5] Plaintiff Maguire was one of the TWU Local 550 officials who signed the contract and who recommended its ratification by TWA's Cabin Attendants and Pursers.

In the wake of the TWA strike by TWU Local 550, which represented flight attendants on other airlines as well (*e.g.*, American and Eastern Airlines), TWU chartered a new TWU local, Local 551, to represent TWA employees only, with plaintiff Maguire as its Acting President. Based on the 1972-1973 negotiations, TWA moved in the law suit to have TWU Local 550, which was still named as a plaintiff, realigned as a party defendant, and to have TWU and its new Local 551 joined as parties defendant. That motion was now granted, and the District Court directed the individual plaintiffs to file a new complaint naming the unions as defendants, but not requiring them to allege claims against them; the District Court further ruled that Mr. Feldman could not represent both the individual plaintiffs and a defendant union in the lawsuit. The new complaint naming the unions as defendants, signed by Feldman, was then served, but no claims were asserted against the unions. TWA's answer to the new complaint denied that the Purser differential was discriminatory because of sex or unlawful, but also contained cross-claims against defendants TWU Locals 550 and 551 and against TWU itself for contribution, damages, and indemnification if any liability was found against TWA. All three unions, TWU Local 550, Local 551, and TWU, represented by new counsel, appeared and now asserted the legality of the Purser differential they had negotiated.

---

[5]Plaintiff Maguire, Chairman of TWU Local 550's Master Executive Council and TWU Local 550 Treasurer during the strike, testified:

"Q So it is true that a condition to your ending the strike which began at 12:01 A.M. on November 5, 1973 was TWA's agreement to grant an across the board percentage increase to all categories of TWA flight attendants including pursers and domestic and international cabin attendants?

A Yes.

Q And the result of TWA's acquiescence in that demand was to expand the dollar differential between pursers on the one hand and the cabin attendants both domestic and international on the other?

A That was the end result."

During the trial, the District Court dismissed the Title VII claims on the ground that Maguire's Title VII action had not been timely commenced, because filed more than 30 days after receipt by Maguire of written notice of failure of conciliation (*Maguire* v. *TWA, supra,* 403 F. Supp. 734). In dismissing, the District Court particularly noted the "cynical" attempt by Maguire and her TWU Local 550 attorney to manipulate the time for filing suit in order to gain maximum benefit from the pending contract negotiations, in which they were attempting to increase the very differential they were about to charge was unlawful (403 F. Supp. at 746). After the trial started, and before the trial record closed, the unions demanded and obtained still another contract increasing the Purser pay differential.

If, despite the fact that TWA's Purser pay differential was maintained and increased at the insistence of the unions, twice to the point of strike during the pendency of the suit, it should ultimately be adjudged that the differential was in fact based on sex and unlawful and that TWA is liable in damages, it would, we submit, be unconscionable for TWA not to have a right of contribution against the unions. That result would obviously frustrate, not further, the statutory purpose, explicitly stated, to inhibit discriminatory collective bargaining agreements (29 U.S.C. §206(d)(1), (2); 42 U.S.C. §2000e-2(a),(c)). It would encourage unions to coerce employers, by strike, or by threat to strike, to enter into discriminatory contracts without practical concern that they were thereby subjecting themselves to actual liability. Plainly, the possibility that the employees, the Secretary of Labor, or the EEOC would sue the union for entering into a discriminatory contract, was not a sufficiently effective deterrent against TWU Local 550; in 1973, that union was itself formally a *plaintiff* suing to end the differential and to impose liability for it on TWA at the very time it was successfully striking, with its parent TWU, to obtain TWA's agreement to increase it.

Denial of an employer right to require contribution, we submit, would remove the most effective deterrent against

union violation of Section 206(d)(2) of the Equal Pay Act and of Section 2000e-2(c)(3) of Title VII in circumstances like TWA's.

II.

UNIONS WERE RESPONSIBLE IN DAMAGES TO EMPLOYEES FOR DISCRIMINATORY CONTRACTS UNDER THE FEDERAL LABOR STATUTES BEFORE THE EQUAL PAY AND CIVIL RIGHTS ACTS WERE PASSED; THOSE STATUTES DID NOT ELIMINATE THAT LIABILITY; NO INFERENCE CAN BE DRAWN OF A CONGRESSIONAL PURPOSE IN ENACTING THE LATER STATUTES TO INSULATE UNIONS FROM PRE-EXISTING LIABILITY FOR SUCH CONDUCT.

It seems to be generally argued that the employer's right of contribution against a union depends, at least in part, (1) upon the availability of a right in the employee (whether or not exercised) to recover from the union for the same injury for which the employer is liable, and (2) upon whether recognition of a right to contribution would frustrate the presumed purpose of Congress in enacting the statute which is the basis for the employer's liability.[6] In that context, it must be significant that before Congress passed the Equal Pay Act in 1963 and Title VII in 1964 it was widely understood that unions were already liable in damages to employees, by force of federal statute, for discriminatory collective agreements which were actionable breaches of the union's duty of fair representation, even without statutes explicitly prohibiting employers or unions from making or implementing such agreements.

This Court held in *Steele* v. *Louisville & Nashville Ry., supra,* in 1944, in order to avoid constitutional questions otherwise presented, that such agreements violated a statutory

---

[6]We note that there does not appear to be presented, in this case, the separate question of whether there exists a right of contribution under state law where the employer liability sought to be shared is created by federal law.

union duty of fair representation, implied by the Court from the statute making the union selected by the majority of the employees in a craft or class the exclusive representative of all members of that craft or class; the Court also held that the union was liable in damages to the employees for breach of that statutory duty; *see also International Brotherhood of Electrical Workers* v. *Foust,* 442 U.S. 42, 46 n. 8 (1979) (same obligation under National Labor Relations Act). By 1963, the basic principle had been reiterated by this Court in *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen,* 323 U.S. 210 (1944); *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen,* 338 U.S. 232 (1949); *Brotherhood of Railroad Trainmen* v. *Howard,* 343 U.S. 768 (1952); and *Conley* v. *Gibson,* 355 U.S. 41 (1957).

While those cases were cases of racial discrimination, it was understood that the same liability attached to any form of unfair discrimination:

> "The cases also make plain—and this of course is implicit in *Steele*—that discrimination not based on color may violate the union's duty even as discrimination along color lines does" [*see* Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System,* 67 YALE L. J. 1327, 1335 (1958)].

See also Cox, *The Duty of Fair Representation,* 2 VILLANOVA L. Rev., 151, *passim* (1957). Moreover, by 1963, there was authority that an *employer* was derivatively liable, with the union, for damages caused to the employee by the union's breach of its federal duty of fair representation in the form of joint employer-union action [*Central of Georgia Ry.* v. *Jones,* 229 F.2d 648 (5th Cir. 1956); *Richardson* v. *Texas & N.O. R.R.,* 242 F.2d 230 (5th Cir. 1957), subsequently cited in *Vaca* v. *Sipes,* 386 U.S. 171 at 186 (1967), and in *Glover* v. *S.L.-S.F. Ry. Co.,* 393 U.S. 324, 331 (1969) (Harlan, J., concurring)].

A few years following the passage of the Equal Pay Act and Title VII, a distinguished commentator, Michael Sovern, in

his LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT, *supra*, had occasion to observe:

> "As we shall see, the National Labor Relations Act and the Railway Labor Act have both been successfully invoked against some forms of union bigotry. Since Title VII says nothing about them, they presumably remain pertinent, even though, once again, dual regulation may result in some instances. This view is supported by a Justice Department memorandum presented to the Senate by Senator Joseph S. Clark during that body's discussion of Title VII. The memorandum said:
>
> > 'Nothing in title VII or anywhere else in this bill affects rights and obligations under the NLRA and the Railway Labor Act. The procedures set up in title VII are the exclusive means of relief against those practices of discrimination which are forbidden as unlawful employment practices by sections 704 and 705. Of course, title VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other Federal and State statutes. If a given action should violate both title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction. . . . At any rate, title VII would have no effect on the duties of any employer or labor organization under the NLRA or under the Railway Labor Act, and these duties would continue to be enforced as they are now. . . .'
>
> Senator Clark added that Title VII 'would not affect the present operation of any part of the National Labor Relations Act or rights under existing labor laws'" (*id.* 98).
>
> * * *
>
> "The duty of fair representation was first articulated in the courts, and for most of the twenty-two years since the *Steele* case enforcement has rested mainly with them. State as well as federal courts have been held competent to

enforce the duty, and both have been free to award damages, injunctions, or both in appropriate cases" (*id.* 154).

* * *

"Perhaps Title VII of the Civil Rights Act of 1964 will succeed in eliminating the pockets of union discrimination that have so far resisted other remedies, but we have some reason to be pessimistic. Title VII needs complementing and Congress apparently recognized that need, for it made no effort to supplant any of the remedies antedating the 1964 legislation. Of particular interest here, Congress left fully available whatever help a wronged workman could obtain under the National Labor Relations and Railway Labor Acts" (*id.* 174).

The question of an employer's right to contribution from a union for liability imposed on the employer by the Equal Pay Act or Title VII resulting from unfair discriminatory collective bargaining agreements must thus begin with the proposition that the unions were already liable to the employees in damages under the federal labor laws for such agreements before the new statutes and remained so liable after the new statutes; the new statutes provided *new* remedies for that form of discrimination[7] and also served to define specific union activity which would unarguably constitute a breach of the union's pre-existing statutory duty of fair representation.

Typical of contribution cases, there appears to be no *direct* evidence as to any actual Congressional intention for or against an employer's federal right of *contribution* against guilty unions in connection with passage of the Equal Pay Act and Title VII. There is considerable evidence, discussed in Petitioner's brief, of an intention that unions were to have direct liability to employees under those statutes. In our view, however, the question of whether there is any impediment to contribution

[7]At the very least, §216(c) of the Equal Pay Act gave the Secretary of Labor the right to secure damages on the employee's behalf, and Title VII specifically authorized administrative investigation of a charge, conciliation, and an employee court suit for damages with provision for attorneys fees (42 U.S.C. §2000e-5).

from unions for employer liability under those statutes cannot be determined solely by examination of those statutes alone, considered in isolation. Each of those statutes is only part of a larger structure of law, and within that larger structure the unions were already liable, and have remained liable, in damages to the employees *under the earlier labor statutes* for joint employer-union unfair discrimination.

In that larger legal framework, we submit, there can be no policy or practical basis for inferring from the addition of certain new rights of action against employers and unions under the Equal Pay Act or Title VII a Congressional intention that *unions* were to be insulated from suits for unfair discrimination expressed in union-employer agreements or not subject to damages for contribution by employers sued under the new statutes for actions for which the unions were already liable and continued to remain liable.

CONCLUSION

The Court should recognize an employer's right to contribution from unions for liability imposed on the employer under the Equal Pay Act and Title VII where that liability arises out of collective bargaining agreements.

Dated: New York, New York
August 30, 1980

Respectfully submitted,

HERBERT PRASHKER
Attorney for Trans World Airlines, Inc.
Amicus Curiae

Of Counsel:
POLETTI FREIDIN PRASHKER
FELDMAN & GARTNER

PEYTON H. MOSS
ERIC D. WITKIN

Supreme Court, U.S.
FILED
NOV 5 1980
MICHAEL RODAK, JR., CLERK

No. 79-1056

In the Supreme Court of the United States

OCTOBER TERM, 1980

NORTHWEST AIRLINES, INC., PETITIONER

v.

TRANSPORT WORKERS OF AMERICA, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

WADE H. MCCREE, JR.
Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

HARLON L. DALTON
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

LEROY D. CLARK
General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20506

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1056

NORTHWEST AIRLINES, INC., PETITIONER

v.

TRANSPORT WORKERS OF AMERICA, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

QUESTIONS PRESENTED

1. Whether a right to contribution may be asserted against a labor organization by an employer held liable under the Equal Pay Act of 1963.

2. Whether a right to contribution may be asserted against a labor organization by an employer held liable under Title VII of the Civil Rights Act of 1964.

TABLE OF CONTENTS

	Page
Interest of the United States and the Equal Employment Opportunity Commission	1
Statement	1
Summary of Argument	3
Argument	6
I. Whether there should be a right to contribution among those who have caused injury by violating a federal statutory duty is basically a question of statutory interpretation	6
II. An implied right to contribution would undermine the policies, and interfere with enforcement, of the Equal Pay Act	15
A. Whether a private right of action against unions exists under the Equal Pay Act	15
B. Like other provisions of the FLSA, the Equal Pay Act is designed to prevent employers from engaging in unfair competition through the payment of substandard wages	20
C. A right to contribution would nullify the economic incentive built into the Equal Pay Act's remedies to encourage employer compliance	23
III. A right to contribution would undermine the policies, and interfere with enforcement, of Title VII	27
A. A right to contribution would nullify Commission efforts to encourage compliance with Title VII through the exercise of prosecutorial discretion	27

PREVIOUS PAGE WAS BLANK

Argument—Continued Page

B. A right to contribution is not compatible with Title VII's twin objectives of a preference for conciliation and an opportunity for effective enforcement 28

Conclusion 31

Appendix 1a

TABLE OF AUTHORITIES

Cases:

Alabama v. *Blue Bird Body Co.*, No. 79-23-N (M.D. Ala. June 22, 1979), appeal pending, No. 79-2667 (5th Cir. filed July 26, 1979) 9
Albemarle Paper Co. v. *Moody*, 422 U.S. 405 26
Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 29
Amalgamated Ass'n of Street Employees v. *Lockridge*, 403 U.S. 274 16
Ampicillin Antitrust Litigation, In re, MDL 248 (N.D. Tex. Sept. 1, 1978), appealed *sub nom. Iowa Beef Processors, Inc.* v. *Spencer Foods, Inc.*, No. 78-3346 (5th Cir.) 9
Ammons v. *Zia Co.*, 448 F.2d 117 16
Bedell v. *Reagan*, 159 Me. 292, 192 A.2d 24 7
Best v. *Yerkes*, 247 Iowa 800, 77 N.W.2d 23 7
Blanton v. *Southern Bell Tel. & Tel. Co.*, 49 F.R.D. 162 11
Bowe v. *Colgate-Palmolive Co.*, 272 F. Supp. 332, aff'd in part, reversed in part and remanded, 416 F.2d 711 11
Brennan v. *Emerald Renovators, Inc.*, 410 F. Supp. 1057 ..... 9, 24
Brooklyn Savings Bank v. *O'Neil*, 324 U.S. 697 26
Burk Builders, Inc. v. *Wirtz*, 355 F.2d 451 21
Cohen v. *United States*, 75-1 U.S. Tax Cas. ¶ 9391 10
Cooper Stevedoring Co. v. *Fritz Kopke, Inc.*, 417 U.S. 106 ..... 4, 8
Cort v. *Ash*, 422 U.S. 66 ..... 13, 14

Cases—Continued

	Page
Corrugated Container Antitrust Litigation, In re, 1979-1 Trade Cas. (CCH) ¶ 62,690 (S.D. Tex. May 30, 1979), aff'd mem., No. 79-2439 (5th Cir. Oct. 30, 1979), cert. granted *sub nom. Westvaco Corp.* v. *Adams Extract Com.*, No. 79-972 (June 16, 1980)	9
Davis v. *Broad St. Garage*, 191 Tenn. 320, 232 S.W.2d 355	7
deHaas v. *Empire Petroleum Co.*, 286 F. Supp. 809	10
Denicola v. *G.C. Murphy Co.*, 562 F.2d 889	9
DiBenedetto v. *United States*, 75-1 U.S.T.C. ¶ 9503	10
EEOC v. *Air Line Pilots Ass'n*, 489 F. Supp. 1003	22
EEOC v. *Ferris State College*, 23 Fair Empl. Prac. Cas. 434	9, 24
El Camino Glass Co. v. *Sunglo Glass Co.*, 1977-1 Trade Cas. (CCH) ¶ 61,533	9, 24
Ellis v. *Chicago & N.W. Ry.*, 167 Wis. 392, 167 N.W. 1048	7
Ferri v. *Ackerman*, 444 U.S. 193	25
Fine Paper Antitrust Litigation, In re, 1979-1 Trade Cas. (CCH) ¶ 62,551	9
Funk v. *United States*, 290 U.S. 371	13
George's Radio, Inc. v. *Capital Transit Co.*, 75 U.S. App. D.C. 187, 126 F.2d 219	7, 10
Gilbert v. *General Electric Co.*, 59 F.R.D. 267	11
Globus, Inc. v. *Law Research Service, Inc.*, 318 F. Supp. 955	10
Goldman v. *Mitchell-Fletcher Co.*, 292 Pa. 354, 141 A. 231	7
Glus v. *G.C. Murphy Co.*, Nos. 79-1507, 79-1508 (3d Cir. June 27, 1980)	11, 13, 23
Gomes v. *Brodhurst*, 394 F.2d 465	10
Gould v. *American Hawaiian S.S. Co.*, 387 F. Supp. 163	10
Grogg v. *General Motors Corp.*, 72 F.R.D. 523	11
Halcyon Lines v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282	6
Hawkins v. *United States*, 358 U.S. 74	13

Cases—Continued Page

Hedges Enterprises v. *Continental Group, Inc.*, 1979-1 Trade Cas. (CCH) ¶ 62,717 9
Heizer Corp. v. *Ross*, 601 F.2d 330 10
Herzfield v. *Laventhol, Krekstein, Horwath & Horwath*, 378 F. Supp. 112 10
Hines v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 16
Hodgson v. *Sagner, Inc.*, 326 F. Supp. 371 aff'd, 462 F.2d 180 22
Hodgson v. *Wheaton Glass Co.*, 446 F.2d 527 21
Johnson v. *Goodyear Tire and Rubber Co., Synthetic Rubber Plant*, 491 F.2d 1364 28
Kohr v. *Allegheny Airlines, Inc.*, 504 F.2d 400, cert. denied, 421 U.S. 978 10
Laffey v. *Northwest Airlines, Inc.*, 366 F. Supp. 763 aff'd in part and vacated in part, 567 F.2d 429, cert. denied, 434 U.S. 1086 ..... 1, 2, 16
Love v. *Temple University*, 366 F. Supp. 835 9
Lynch v. *Sperry Rand Corp.*, 62 F.R.D. 78 11
Macklin v. *Spector Freight Systems, Inc.*, 478 F.2d 979 28
Marshall v. *Tombs Janitorial Services, Inc.*, 82 Lab. Cas. ¶ 33,559 9
McNabb v. *United States*, 318 U.S. 332 13
Miree v. *DeKalb County*, 433 U.S. 25 10
Myers v. *Gilman Paper Corp.*, 544 F.2d 837, modified on rehearing, 566 F.2d 758, cert. dismissed, 434 U.S. 801 28
Occidental Life Insurance Co. v. *EEOC*, 432 U.S. 355 28-29
Olson Farms, Inc. v. *Safeway Stores, Inc.*, 1979-2 Trade Cas. (CCH) ¶ 62,995 ..... 9, 24
Overnight Motor Transp. Co. v. *Missel*, 316 U.S. 572 26
Patterson v. *American Tobacco Co.*, 535 F.2d 257, cert. denied, 429 U.S. 920 28
Professional Beauty Supply, Inc. v. *National Beauty Supply, Inc.*, 594 F.2d 1179 ..... 9, 24
Quatray v. *Wicker*, 178 La. 289, 151 So. 208 7
Royal Indem. Co. v. *Aetna Cas. & Sur. Co.*, 193 Neb. 752, 299 N.W.2d 183 7

Cases—Continued Page

Sabre Shipping Corp. v. *American President Lines, Ltd.*, 298 F. Supp. 1339 ..... 9, 24
Schultz v. *Wheaton Glass Co.*, 421 F.2d 259, cert. denied, 398 U.S. 905 16
Skinner v. *Reed-Prentice Div. Package Mach. Co.*, 70 Ill. 2d 1, 374 N.E.2d 437 6
Tuma v. *American Can Co.*, 367 F. Supp. 1178 9
Underwriters at Lloyds v. *Smith*, 166 Minn. 388, 208 N.W. 13 7
Union Stock Yards Co. v. *Chicago B. & Q. R.R.*, 196 U.S. 217 6
United States v. *Darby*, 312 U.S. 100 21
United States v. *Yellow Cab Co.*, 340 U.S. 543 10
Usery v. *Beloit College*, 20 Fair Empl. Prac. Cas. 936, 12 Empl. Prac. Dec. ¶ 11,203 9
Wilson P. Abraham Construction Corp. v. *Texas Industries, Inc.*, 604 F.2d 897, petition for cert. pending *sub nom. Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, No. 79-1144 ..... 9, 11, 24
Wirtz v. *Hayes Industries, Inc.*, 9 Fair Empl. Prac. Cas. 493, 1 Empl. Prac. Dec. ¶ 9874 9
Wirtz v. *Jones*, 340 F.2d 901 21
Wirtz v. *Malthor, Inc.*, 391 F.2d 1 21
Vaca v. *Sipes*, 386 U.S. 171 16

Statutes and rules:

Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.* 22
Section 2, 29 U.S.C. 621 22
Section 7(b), 29 U.S.C. 626(b) 22
Section 7(c), 29 U.S.C. 626(c) 22
Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* 1
42 U.S.C. 2000e-2(h) 16
42 U.S.C. 2000e-4(g)(4) 28
42 U.S.C. 2000e-5(a), (c) 29
42 U.S.C. 2000e-5(b) 28
42 U.S.C. 2000e-5(f) 16
42 U.S.C. 2000e-5(g)(1) 28
42 U.S.C. 2000e-5(g)(2) 28
42 U.S.C. 2000e-5(g) 16

Statutes and rules—Continued

	Page
Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56, amending Section 6 of the Fair Labor Standards Act, 29 U.S.C. 206:	
Section 2(a)(5)	21
Section 3(d)	1, 20
Section 3(d)(1)	21
Section 3(d)(3)	20
Fair Labor Standards Act, 29 U.S.C. 201 et seq...	1
29 U.S.C. 202(a)(3)	21
29 U.S.C. 202(a)(5)	21
29 U.S.C. 216(b)	21, 26
29 U.S.C. 216(c)	21
29 U.S.C. 217	27
18 U.S.C. 3771	13
28 U.S.C. 1292(b)	3
Alaska Stat. § 09.16.010 (1973)	7
Ark. Stat. Ann. §§ 34-1001 to 34-1009 (1962)	7
Cal. Civ. Proc. Code §§ 875-880 (West 1980)	7
Colo. Rev. Stat. §§ 13-50.5-101 to 13.5-106 (Supp. 1979)	7
Del. Code Ann. tit. 10, §§ 6301-6308 (1975)	7
Fla. Stat. Ann. § 768.31 (West Supp. 1979)	7
Ga. Code Ann. § 105-2012 (1968 & Supp. 1980)	7
Hawaii Rev. Stat. §§ 663-11 to 663-17 (1976)	7
Idaho Code § 6-803 (1979)	7
Kan. Stat. Ann. § 60-2413 (1976)	7
Ky. Rev. Stat. Ann. § 412.030 (Baldwin 1977)	7
La. Code Civ. Pro. Ann. arts. 2100-2105 (West 1977)	7
Md. Ann. Code art. 50, §§ 16-24 (1979)	7
Mass. Ann. Laws ch. 231B, §§ 1-4 (Law. Co-op 1974 & Supp. 1980)	7
Mich. Stat. Ann. § 27A.2925(1)-(4) (Supp. 1980)	7
Miss. Code Ann. § 85-5-5 (1972)	7
Mo. Ann. Stat. § 537.06 (Vernon Supp. 1980)	7
Nev. Rev. Stat. §§ 17.215-17.325 (1978)	7

Statutes and rules—Continued

	Page
N.J. Stat. Ann. §§ 2A:53A-1 to 2A:53A-5 (West 1952)	7
N.M. Stat. Ann. § 41-3-1 (1978)	7
N.Y. Civ. Prac. Law §§ 1401-1403 (McKinney 1976)	7
N.C. Gen. Stat. § 1B-1 (1969)	7
N.D. Cent. Code §§ 32-38-01 to 32-38-04 (1976)	7
Or. Rev. Stat. § 18.440 (1977)	7
Pa. Stat. Ann. tit. 42, §§ 8321-8328 (Purdon Supp. 1980)	7
R. I. Gen. Laws §§ 10-6-1 to 10-6-11 (1956 & Supp. 1979)	7
S.D. Comp. Laws Ann. §§ 15-8-11 to 15-8-22 (1969 & Supp. 1979)	7
Tenn. Code Ann. §§ 23-3101 to 23-3106 (Supp. 1979)	7
Tex. Civ. Stat. Ann. art. 2212a, § 2 (Vernon Supp. 1980)	7-8
Utah Code Ann. §§ 78-27-39 to 78-27-43 (1977)	8
Va. Code § 8.01-34 (1977)	8
W. Va. Code § 55-7-13 (1966 & Supp. 1980)	8
Wis. Stat. Ann. §§ 113.01-113.05 (West 1974)	7
Wyo. Stat. § 1-1-110 (1977)	8
Fed. R. Civ. P:	
Rule 19(a)	2
Rule 54(b)	3
Miscellaneous:	
108 Cong. Rec. (1962):	
p. 14766	18
pp. 14766-14767	17
109 Cong. Rec. (1963):	
p. 9195	19
p. 9196	20
p. 9207	20
p. 9209	18
p. 9210	20
p. 9216	20

Miscellaneous—Continued Page

Easterbrook, Landes, and Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, scheduled for publication in Journal of Law and Economics (Oct. 1980) 25
EEOC Compliance Manual (CCH) (1979) 29
Exec. Order No. 12,067, 43 Fed. Reg. 28967 (1978) 1
Exec. Order No. 12,144, 44 Fed. Reg. 37193 (1979) 1
H.R. 11677, 87th Cong., 2d Sess. (1962) 17-18
Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. (1979) 25
Note, *The Applicability of Federal Common Law To Aviation Tort Litigation*, 63 Geo. L.J. 1083 (1975) 10
Note, *Contribution Among Antitrust Violators*, 29 Cath. L. Rev. 669 (1980) 29
Note, *Contribution in Private Antitrust Actions*, 93 Harv. L. Rev. 1540 (1980) 25
Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702 (1980) 28
W. Prosser, *Handbook of the Law of Torts* (4th ed. 1971) 6, 12, 15, 29
Rose, *Contribution In Antitrust: Some Policy Considerations*, scheduled for publication in Antitrust Law Journal (1980) 25
Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978) 1
Restatement (Second) of Torts (1979) 6, 12, 29
S. Rep. No. 96-428, 96th Cong., 1st Sess. (1979).. 24
Schaefer, *Precedent and Policy*, 34 U. Chi. L. Rev. (1966) 12

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

By order of February 25, 1980, the Court invited the United States to express its views on the petition for certiorari. We urged that the petition be held or denied. The petition having been granted, we file this brief on the merits.

The Equal Employment Opportunity Commission is charged with the administration, interpretation, and enforcement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Equal Pay Act of 1963, 29 U.S.C. 206(d). See Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978); Exec. Order No. 12067, 43 Fed. Reg. 28967 (1978); Exec. Order No. 12144, 44 Fed. Reg. 37193 (1979). The Department of Justice also has important enforcement responsibilities under Title VII, and the Department of Labor retains enforcement responsibilities under other provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, to which the Equal Pay Act was added by Congress. This case presents questions concerning an employer's right to contribution from labor organizations for back pay liability arising under both Title VII and the Equal Pay Act.

STATEMENT

This suit had its genesis in *Laffey* v. *Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C. 1973), aff'd in part and vacated in part, 567 F.2d 429 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978), in which Northwest Airlines was found to have violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Equal Pay Act of 1963, 29 U.S.C. 206(d), by compensating two classes of female cabin attendants less than male cabin attendants for substantially equal work. The plaintiffs were awarded back pay under both statutes (Pet. App. 2b).

The discriminatory salary differentials found unlawful in *Laffey* were prescribed in collective bargaining agreements between Northwest and the cabin attendants' successive unions, the Transport Workers Union (TWU) and the Air Line Pilots Association (ALPA) (Pet. App. 2b). However, only Northwest was named in charges filed with the EEOC and as a defendant in the *Laffey* suit (Pet. App. 9b). The plaintiffs subsequently joined ALPA as a non-aligned party under Fed. R. Civ. P. 19 (a) without objection by Northwest, " 'solely for the limited purpose of assuring that the court [would] have before it all the parties necessary to effectuate relief' [which might, of course, necessitate reform of the collective agreement]." 567 F.2d at 477-478. ALPA did not, however, actively participate in the litigation (Pet. App. 4d).

After trial and entry of judgment against Northwest, the airline for the first time sought contribution or indemnity from the unions, moving for leave to file a third-party complaint against TWU and to amend its answer to assert a cross-claim against ALPA (Pet. App. 2b). Both motions were denied. The court of appeals affirmed that ruling as within the district court's discretion, noting (567 F.2d at 477) that "[t]o have reopened the litigation at the point [Northwest Airlines] sought it would not only have been judicially uneconomical but would also have inflicted a hardship on the parties." Northwest did not seek review of this holding in its petition for certiorari in *Laffey*.

Northwest subsequently filed this separate action seeking reimbursement from TWU and ALPA for a portion of the mandatory liability assessed against it in *Laffey* (Pet. App. 4d). The complaint alleged that the unions shared liability with the employer under the Equal Pay Act and Title VII because they had negotiated, executed, and enforced collective bargaining contracts prescribing the unlawful salary differentials (*ibid.*). Ruling on the unions' motions to dismiss, the district court held (Pet. App. B) that there is a federal common law right to con-

tribution for liability imposed under Title VII, but not under the Equal Pay Act. Regarding the Equal Pay Act. the court concluded that neither employees nor employers have a right of action against labor organizations for violations of the Act and that to imply such a right would conflict with the policies underlying the statute (*id.* at 3b-7b). As to Title VII, the court held that the failure of the *Laffey* plaintiffs to name the unions in an EEOC charge did not bar contribution for the Title VII violations because contribution arises under federal common law rather than under the statute (*id.* at 8b-10b). The court further concluded that a right to contribution from labor organizations would further the policies of Title VII (*id.* at 15b-17b). Thereafter, the district court certified its Title VII holding for interlocutory appeal under 28 U.S.C. 1292(b), and entered judgment on the Equal Pay Act contribution claim under Fed. R. Civ. P. 54(b) (Pet. App. 5d).

The court of appeals granted the interlocutory appeal, affirmed the lower court's dismissal of the contribution claim insofar as it was based on Equal Pay Act liability, and vacated and remanded for a determination of whether the Title VII contribution claim was barred by laches (Pet. App. D). The court held that a right to contribution from labor organizations would be inconsistent with the policies and scheme of the Equal Pay Act because Congress did not intend to render unions jointly liable to private plaintiffs for violations of the statute (*id.* at 10d-11d). However, the court of appeals declined to decide the question whether a right to contribution exists for liability incurred under Title VII. Instead, in view of questions raised on appeal concerning whether the Title VII contribution claim was timely, the court remanded to allow the district court to resolve that issue in the first instance (*id.* at 12d).

SUMMARY OF ARGUMENT

I

At common law, contribution among joint tortfeasors was not permitted. The great majority of states have

since abrogated that rule to some degree, usually by statute. Congress, however, has not adopted a general rule permitting joint tortfeasors to seek contribution from each other. Nor has this, or any other, federal court.

In *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974), the Court applied an ancient admiralty "division of damages" rule in a suit brought by an injured longshoreman against the vessel on which his injury occurred, and permitted the vessel's owner to seek contribution from a stevedoring company notwithstanding the common law prohibition. Since then, lower courts have considered whether contribution should be permitted in conjunction with a variety of statutory torts. In so doing, the courts generally have followed much the same approach as that traditionally employed in determining whether a private right of action should be implied to remedy violations of a statute—they have ascertained Congress's purposes in passing the statute and considered whether Congress would have viewed the contended for right of action as an appropriate means of furthering those statutory purposes.

We believe that approach is sound and, accordingly, focus our attention on the impact a contribution rule would have on the policies underlying, and on the enforcement of, the Equal Pay Act and Title VII.

II

It is well-settled in jurisdictions allowing contribution that it is not available unless both the party seeking it and the party against whom it is sought potentially are liable to the injured party. Thus, it ordinarily would be appropriate to determine as a threshold matter whether respondent unions could have been sued by the cabin attendants who secured a judgment against Northwest Airlines. While the answer under Title VII is a clear yes, whether an employee can sue a union under the Equal Pay Act is an open question. There is much to suggest that Congress intended that unions would be held accountable under the Pay Act in the same manner and to the same extent as employers. On the other hand, Congress

failed to so provide expressly, and adopted an enforcement scheme—the Fair Labor Standards Act—that by its very structure and underlying rationale is inconsistent with monetary recovery from unions. Whether a right of action against unions exists under the Equal Pay Act is thus subject to doubt. The Court need not, however, decide the question since there are other compelling reasons for concluding that contribution is inappropriate under the Pay Act.

Contribution would undermine the policies, and interfere with enforcement, of the Equal Pay Act. The FLSA enforcement scheme adopted by the Pay Act is designed to prevent employers from engaging in unfair competition and to deprive them of economic benefits derived from paying substandard wages. These goals would be undermined were employers free to offset Pay Act liability through contribution. If a Pay Act judgment is paid in part out of a union's treasury, to that extent the offending employer would obtain services without paying full value for them, and its law-abiding competitors would be placed at a competitive disadvantage. Moreover, a right to contribution would nullify the Pay Act's built-in incentive for employers to abide by the statute. In addition to permitting employees to recover the difference between what they actually earned and what they should have earned, the Pay Act provides for recovery of an equivalent amount as liquidated damages. Absent this liability for double damages, an employer would risk nothing by violating the statute.

III

For somewhat different reasons, contribution would undermine the policies, and interfere with enforcement, of Title VII. As part of a recently adopted policy designed to encourage good faith efforts "of a compelling and aggressive nature" by employers or unions to eliminate discriminatory employment practices when their bargaining partners oppose voluntary compliance, the EEOC has resolved that in appropriate cases a party's good faith

unilateral bargaining efforts, even if not successful, should shield it from government prosecution under Title VII. Where the Commission in furtherance of this policy sues only one party to a bargaining agreement, a contribution claim by that party against its bargaining partner would undermine the Commission's efforts.

Contribution is also inconsistent with the preference expressed in Title VII for conciliation and voluntary resolution of disputes. In many cases, potential contribution defendants would not be parties to the underlying litigation, or would become parties at too late a stage to participate in Title VII's conciliation procedures. Moreover, where conciliation proves unsuccessful, contribution would create a number of disincentives—for plaintiffs and defendants alike—to settlement. Finally, contribution would complicate and expand Title VII proceedings, to the detriment of private plaintiffs, and would create increased burdens on the judiciary without any corresponding increase in statutory enforcement.

ARGUMENT

I. WHETHER THERE SHOULD BE A RIGHT TO CONTRIBUTION AMONG THOSE WHO HAVE CAUSED INJURY BY VIOLATING A FEDERAL STATUTORY DUTY IS BASICALLY A QUESTION OF STATUTORY INTERPRETATION

The early common law rule, enunciated in *Union Stock Yards Co.* v. *Chicago B. & Q. R.R.*, 196 U.S. 217 (1905), denied any right to contribution among joint tortfeasors. See *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285 (1952); W. Prosser, *Handbook of the Law of Torts* § 50 at 305-306 (4th ed. 1971); *Restatement (Second) of Torts* § 886A, Comment a (1979). In recent years most states, 39 in all plus the District of Columbia, have abrogated that rule to some extent. However, only 10 did so initially by judicial fiat,[1]

---

[1] *Skinner* v. *Reed-Prentice Div. Package Mach. Co.*, 70 Ill. 2d 1, 374 N.E. 2d 437 (1977) (but see Dooley, J., dissenting on the

and of those, four later adopted statutory refinements.[2] In the remaining 30 states the task of fashioning a body of contribution law was undertaken by the legislature.[3]

---

grounds that the decision thrusted a "too violent wrench in the law" and that its failure to articulate how the new doctrine would operate promised a proliferation of litigation (70 Ill. 2d at 40, 374 N.E. 2d at 455)); *Royal Indem. Co.* v. *Aetna Cas. and Sur. Co.*, 193 Neb. 752, 229 N.W. 2d 183 (1975) (but see Spencer, J., dissenting on the grounds that the majority opinion ignored the rule of stare decisis and invaded the legislative arena, 193 Neb. at 767, 229 N.W. 2d at 191); *George's Radio, Inc.* v. *Capital Transit Co.*, 75 U.S. App. D.C. 187, 126 F.2d 219 (1942); *Best* v. *Yerkes*, 247 Iowa 800, 77 N.W. 2d 23 (1956); *Quatray* v. *Wicker*, 178 La. 289, 151 So. 208 (1933); *Bedell* v. *Reagan*, 159 Me. 292, 192 A.2d 24 (1963); *Underwriters at Lloyds* v. *Smith*, 166 Minn. 388, 208 N.W. 13 (1926); *Goldman* v. *Mitchell-Fletcher Co.*, 292 Pa. 354, 141 A. 231 (1928); *Davis* v. *Broad St. Garage*, 191 Tenn. 320, 232 S.W. 2d 355 (1950); *Ellis* v. *Chicago & N.W. Ry.*, 167 Wis. 392, 167 N.W. 1048 (1918).

The balance of the cases listed in the Appendix to petitioner's brief construe preexisting contribution statutes.

[2] La. Code Civ. Pro. Ann. arts. 2100-2105 (West 1977); Pa. Stat. Ann. tit. 42, §§ 8321-8328 (Purdon Supp. 1980); Tenn. Code Ann. §§ 23-3101 to 23-3106 (Supp. 1979); Wis. Stat. Ann. §§ 113.01-113.05 (West 1974).

[3] Alaska Stat. § 09.16.010 (1973); Ark. Stat. Ann. §§ 34-1001 to 34-1009 (1962); Cal. Civ. Proc. Code §§ 875-880 (West 1980); Colo. Rev. Stat. §§ 13-50.5-101 to 13.5-106 (Supp. 1979); Del. Code Ann. tit. 10, §§ 6301-6308 (1975); Fla. Stat. Ann. § 768.31 (West Supp. 1979); Ga. Code Ann. § 105-2012 (1968 & Supp. 1980); Hawaii Rev. Stat. §§ 663-11 to 663-17 (1976); Idaho Code § 6-803 (1979); Kan. Stat. Ann. § 60-2413 (1976); Ky. Rev. Stat. Ann. § 412.030 (Baldwin 1977); Md. Ann. Code art. 50, §§ 16-24 (1979); Mass. Ann. Laws ch. 231B, §§ 1-4 (Law. Co-op 1974 & Supp. 1980); Mich. Stat. Ann. § 27A.2925(1)-(4) (Supp. 1980); Miss. Code Ann. § 85-5-5 (1972); Mo. Ann. Stat. § 537.060 (Vernon Supp. 1980); Nev. Rev. Stat. §§ 17.215-17.325 (1978); N.J. Stat. Ann. §§ 2A:53A-1 to 2A:53A-5 (West 1952); N.M. Stat. Ann. § 41-3-1 (1978); N.Y. Civ. Prac. Law §§ 1401-1403 (McKinney 1976); N.C. Gen. Stat. § 1B-1 (1969); N.D. Cent. Code §§ 32-38-01 to 32-38-04 (1976); Or. Rev. Stat. § 18.440 (1977); R.I. Gen. Laws §§ 10-6-1 to 10-6-11 (1956 & Supp. 1979); S.D. Comp. Laws Ann. §§ 15-8-11 to 15-8-22 (1969 & Supp. 1979); Tex. Civ. Stat. Ann. art. 2212a, § 2

If any generalization may be drawn from this experience, it is that whether, to what extent, and how contribution should be available are widely perceived to be subjects more suited to legislative, than judicial, determination.

Congress has not adopted any general rule authorizing parties who have committed federal torts, common law or statutory, to seek contribution from joint tortfeasors. Nor has this Court announced so sweeping a rule. In *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974), the Court extended an ancient admiralty "division of damages" rule—providing in essence that colliding vessels must divide damages where both are at fault—to a suit by an injured longshoreman against the vessel on which the injury occurred. The owner of the vessel impleaded and sought contribution from a company that previously had loaded onto the ship palletized crates of cargo between which the longshoreman fell while stowing cargo. Notwithstanding the common law rule against contribution, the vessel was permitted to recover from the stevedoring company half the damages due the plaintiff.

The lower courts have expressed some disagreement over whether *Cooper Stevedoring* has implications extending beyond admiralty jurisdiction, where judicial creation of substantive rules of decision has traditionally been at its zenith. The opinion in *Cooper Stevedoring* suggests not. After noting the deeply established lineage of the "division of damages" rule in admiralty, the Court explicitly referred to and relied on the longstanding difference between the common law and admiralty rules in this regard: "Even though the common law of torts rejected a right of contribution among joint tortfeasors, the principle of division of damages *in admiralty* has, over the years, been liberally extended by this Court in directions deemed just and proper." 417 U.S. at 110 (emphasis added).

(Vernon Supp. 1980); Utah Code Ann. §§ 78-27-39 to 78-27-43 (1977); Va. Code § 8.01-34 (1977); W. Va. Code § 55-7-13 (1966 & Supp. 1980); Wyo. Stat. § 1-1-110 (1977).

In any event, contrary to petitioner's assertion (Pet. Br. 14), federal courts have not "routinely permitted" contribution "in a variety of contexts." No court has recognized a right to contribution where liability arises out of the Equal Pay Act.[4] Nor has any court other than the Eighth Circuit in *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179 (1979), permitted antitrust violators to seek contribution from fellow violators.[5] Contribution has not been permitted among parties jointly and severally liable for violating the tax evasion provisions of the Internal Reve-

[4] See *Denicola* v. *G.C. Murphy Co.*, 562 F.2d 889 (3d Cir. 1977); *EEOC* v. *Ferris State College*, 23 Fair Empl. Prac. Cas. 434 (W.D. Mich. 1980); *Marshall* v. *Tombs Janitorial Services, Inc.*, 82 Lab. Cas. ¶ 33,559 (W.D. Mo. 1977); *Usery* v. *Beloit College*, 20 Fair Empl. Prac. Cas. 936, 12 Empl. Prac. Dec. ¶ 11,203 (W.D. Wis. 1976); *Brennan* v. *Emerald Renovators, Inc.*, 410 F. Supp. 1057 (S.D.N.Y. 1975); *Tuma* v. *American Can Co.*, 367 F. Supp. 1178 (D.N.J. 1973). But see *Love* v. *Temple University*, 366 F. Supp. 835, 842 (E.D. Pa. 1973) (right to contribution a "close legal question"); *Wirtz* v. *Hayes Industries, Inc.*, 9 Fair Empl. Prac. Cas. 493, 494, 1 Empl. Prac. Dec. ¶ 9874 at 1090 (N.D. Ohio 1968) (common law right to contribution against union may be available).

[5] See *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979), petition for cert. pending *sub nom. Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, No. 79-1144; *In re Corrugated Container Antitrust Litigation*, 1979-1 Trade Cas. (CCH) ¶ 62,690 (S.D. Tex. May 30, 1979), aff'd mem., No. 79-2439 (5th Cir. Oct. 30, 1979), cert. granted *sub nom. Westvaco Corp.* v. *Adams Extract Com.*, No. 79-972 (June 16, 1980); *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979-2 Trade Cas. (CCH) ¶ 62,995 (10th Cir. 1979); *In re Fine Paper Antitrust Litigation*, 1979-1 Trade Cas. (CCH) ¶ 62,551 (E.D. Pa. Aug. 8, 1979); *Alabama* v. *Blue Bird Body Co.*, No. 79-23-N (M.D. Ala. June 22, 1979), appeal pending, No. 79-2667 (5th Cir. filed July 26, 1979); *Hedges Enterprises* v. *Continental Group, Inc.*, 1979-1 Trade Cas. (CCH) ¶ 62,717 (E.D. Pa. June 20, 1979); *In re Ampicillin Antitrust Litigation*, MDL 248 (N.D. Tex. Sept. 1, 1978), appealed *sub nom. Iowa Beef Processors, Inc.* v. *Spencer Foods, Inc.*, No. 78-3346 (5th Cir.); *El Camino Glass Co.* v. *Sunglo Glass Co.*, 1977-1 Trade Cas. (CCH) ¶ 61,533 (N.D. Cal. 1976); *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F. Supp. 1339 (S.D.N.Y. 1969).

nue Code.[6] And although courts have permitted contribution where liability is implied under the Securities Exchange Act of 1934, most have relied on the fact that several of the civil liability sections of that Act and the Securities Act of 1933 contain express provisions for contribution among intentional wrongdoers.[7] "This is simply a pertinent application of the general principle that the two statutes are to be administered *in pari materia.*" *Globus, Inc.* v. *Law Research Service, Inc.*, 318 F. Supp. 955, 958 (S.D.N.Y. 1970).[8]

Title VII presents a somewhat different picture. In the instant case, the district court's conclusion that contribution may be sought rested on a series of district

---

[6] *DiBenedetto* v. *United States*, 75-1 U.S.T.C. (CCH) ¶ 9503 (D.R.I. 1974); *Cohen* v. *United States*, 75-1 U.S.T.C. (CCH) ¶ 9391 (E.D. Mich. 1975).

[7] See, *e.g.*, *Heizer Corp.* v. *Ross*, 601 F.2d 330, 332 (7th Cir. 1979); *Gould* v. *American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 168-169 (D. Del. 1974); *deHaas* v. *Empire Petroleum Co.*, 286 F. Supp. 809, 816 (D. Colo. 1968); *Herzfield* v. *Laventhol, Krekstein, Horwath & Horwath*, 378 F. Supp. 112, 135 (S.D.N.Y. 1974); *Globus, Inc.* v. *Law Research Service, Inc.*, 318 F. Supp. 955, 958 (S.D.N.Y. 1970).

[8] One court of appeals, in a diversity negligence action arising out of a mid-air collision, held that in that context contribution was available on a comparative negligence basis. *Kohr* v. *Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), cert. denied, 421 U.S. 978 (1975). In the wake of *Miree* v. *DeKalb County*, 433 U.S. 25 (1976), it is doubtful that the *Kohr* court was justified in fashioning a federal common law contribution rule rather than applying applicable state choice-of-law principles. See Note, *The Applicability of Federal Common Law To Aviation Tort Litigation*, 63 Geo. L.J. 1083 (1975). In any event, the case concerned only traditional, non-statutory tort liability; contrary to petitioner's assertion (Pet. Br. 14 n.7), Federal Aviation Act policies were not at issue.

The other decisions cited by Northwest (Pet. Br. 14-15 & n.7) recognized contribution as a matter of local, not federal, law. *Gomes* v. *Brodhurst*, 394 F.2d 465 (3d Cir. 1968) (Virgin Islands); *George's Radio, Inc.* v. *Capital Transit Co.*, 126 F.2d 219 (D.C. Cir. 1942); *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951) (Pennsylvania law applies in Federal Tort Claims Act action).

court opinions reaching or suggesting the same result.[9] However, as the Fifth Circuit observed in considering whether to permit contribution in an antitrust case (*Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, *supra*, 604 F.2d at 903), "[t]he cases decided under the Civil Rights Act [of 1964] do not even discuss the rationales for allowing contribution." More recently, a divided panel of the Third Circuit read this Court's opinion in *Cooper Stevedoring* as "provid[ing] positive support for our conclusion that a federal common law right of contribution exists" under Title VII (*Glus* v. *G. C. Murphy Co.*, Nos. 79-1507 and 79-1508 (June 27, 1980), slip op. 8), and concluded that contribution "would implement the congressional intent to hold both unions and employers liable for unlawful employment practice[s] and would aid the conciliation and settlement goals of Title VII" (*id.* at 8).[10] Thus, except in the Title VII context, it is fair to say that judicial recognition of a right to contribution has been the exception rather than the rule.

---

[9] See, *e.g.*, *Bowe* v. *Colgate-Palmolive Co.*, 272 F. Supp. 332, 358 (S.D. Ind. 1967) (dismissing employer's contribution cross-claim against union because union not, on facts of case, liable for violating Title VII), aff'd in part, rev'd in part and remanded, 416 F.2d 711, 718-719 (7th Cir. 1969) (while union not blameless, no claim lies because it had not been charged before the EEOC); *Blanton* v. *Southern Bell Tel. & Tel. Co.*, 49 F.R.D. 162 (N.D. Ga. 1970) (refusing to dismiss contribution counterclaim against plaintiff union because, in view of *Bowe*, claim not utterly frivolous); *Gilbert* v. *General Electric Co.*, 59 F.R.D. 267 (E.D. Va. 1973) (refusing to dismiss contribution counterclaim against plaintiff union pending trial memoranda, relying on *Bowe* and *Blanton*); *Lynch* v. *Sperry Rand Corp.*, 62 F.R.D. 78 (S.D.N.Y. 1973) (refusing to dismiss contribution counterclaim against plaintiff union, relying on *Blanton* and *Gilbert*); *Grogg* v. *General Motors Corp.*, 72 F.R.D. 523 (S.D.N.Y. 1976) (refusing to dismiss contribution counterclaim, relying on *Lynch*, *Gilbert*, *Blanton*, and *Bowe*).

[10] While the *Glus* court focused on the proper considerations, in our view it followed the right path to the wrong destination. See point III, *infra*.

Illinois Supreme Court Justice Schaefer has succinctly stated the central reason why courts have, in general, been reluctant to extend to statutory torts the contribution rule enunciated in *Cooper Stevedoring*. "The reason, I think, is that the problem is not self-contained. It cannot be satisfactorily solved by judicial announcement of a rule requiring contribution among joint tortfeasors." Schaefer, *Precedent and Policy*, 34 U. Chi. L. Rev. 3, 13 (1966). Instead, a decision in favor of contribution would give birth to a host of difficult questions, including: whether contribution may be asserted against parties (and non-parties) that elect to settle; if not, whether the liability of non-settling defendants is reduced by the amount of the settlement or, instead, by the amount the settlors would owe were contribution from them permitted; in either event, whether contribution shares should be equal, based on comparative fault, comparative benefit from the wrongdoing, or some other equitable measure; whether settling parties can be impleaded back into the litigation so that contribution shares may be determined; whether settling parties can themselves claim a right to contribution; whether contribution is available to "intentional" tortfeasors;[11] whether contribution claims may be tried to a jury; and, finally, what statute of limitations applies and when it begins to run. Therefore, even if, as petitioner repeatedly asserts (Pet. Br. 11, 12, 13), the right to contribution is properly classed as an equitable remedy,[12] the recognition

---

[11] The majority of jurisdictions have continued the common law rule that there is no contribution in favor of those who commit intentional torts. *Restatement (Second) of Torts* § 886A(3), Comment j (1979); W. Prosser, *Handbook of the Law of Torts* § 50, at 308 (4th ed. 1971). Although the intentional/unintentional distinction is reasonably well understood in the context of traditional common law torts, how, if at all, it should be applied to statutory torts, and in particular to violations of employment discrimination laws, is far from apparent.

[12] Petitioner also equates the task of fashioning a rule of contribution to the development of evidentiary rules in federal criminal

of that remedy would involve the courts in the fashioning of a considerable body of substantive and procedural law (divorced from the underpinning of well-developed admiralty doctrine that informed the Court's decision in *Cooper Stevedoring*).

As the court of appeals recognized (Pet. App. 8d), inasmuch as a claim to contribution is a right of action by a "defendant turned third-party plaintiff" based on an asserted federal statutory violation, the tests developed by this Court for determining whether a private right of action to remedy violations of a particular statute should be implied from that statute's purposes and history [13] provide pertinent guidance in determining whether a right to contribution should be implied here. Accord, *Glus* v. *G. C. Murphy Co.*, *supra*, slip op. 12-13. In both cases, the matter is obviously one within the competence of Congress to decide. Therefore, in the absence of explicit congressional direction, the task of the courts is not to create law or fashion policy, but rather to ascertain Congress's purposes in passing the

---

cases, an undertaking this Court identified in *Funk* v. *United States*, 290 U.S. 371 (1933), as a proper one for the judiciary. The analogy does not hold. When this Court formulates rules of evidence, it exercises its traditional supervisory authority over the administration of criminal justice in the federal courts. *McNabb* v. *United States*, 318 U.S. 332, 341 (1943). That task falls within its statutory power to make rules governing practice, pleading, and procedure. 18 U.S.C. 3771; *Hawkins* v. *United States*, 358 U.S. 74, 78 (1958). To fashion a right to contribution, in contrast, is to create a cause of action not explicitly authorized by Congress—thus redefining substantive, rather than procedural, rights.

[13] In *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), four tests were set out: (1) whether the plaintiff is one of the class for whose especial benefit the statute was enacted; (2) whether there is any indication of a legislative intent to create or deny a private right of action; (3) whether implication of such a right is consistent with the underlying purposes of the legislative scheme; and (4) whether the cause of action is one traditionally relegated to state law, thus making it inappropriate to infer a federal cause of action.

particular statute, and to determine whether in furtherance of those purposes Congress, had it focused on the issue, would have provided for the right of action in question.

The court of appeals suggested (Pet. App. 8d) that application of *Cort* v. *Ash*, 422 U.S. 66 (1975), would apparently doom every contribution claim since defendants turned third-party plaintiffs will likely never be part of the class for whose especial benefit the statute was enacted. But this Court in *Cort* merely stated that the "several [enumerated] factors are relevant" (422 U.S. at 78), and did not indicate that any one of them is necessarily dispositive, regardless of how strongly the others may suggest an opposite conclusion under a particular statute. Of course, application of the first *Cort* standard would nonetheless be a substantial impediment to the finding of an implied right of contribution. But we see no reason why a violator of the statute should have an easier burden in this regard than must be borne by a wholly innocent claimant who has been injured by a statutory violation but who is found not to be one of the class for whose especial benefit the statute was enacted. And surely an injured claimant who is a member of that class should have a lesser burden than that of a violator in establishing an implied right of action in his favor.

While the approach courts have followed in determining whether an implied right of contribution should be recognized is very much like that followed in considering whether a first-party right of action should be implied, it inevitably is more complex in view of the subsidiary issues associated with contribution (see page 12, *supra*), and requires a greater degree of judicial involvement. To be sure, the bare recognition of a first-party private right of action does not end the matter; there remain such questions as what remedies may be invoked, by whom, and when. But the reference point for these questions is the statute itself, which sets out rules of conduct, standards of proof, procedures and remedies. In

the contribution context, however, resort inevitably must be made outside the statute to general notions of fairness and efficacy.

Balancing these considerations, we believe the approach this Court should follow in analyzing the contribution question is to apply the *Cort* v. *Ash* criteria, with somewhat greater rigor than might be appropriate in their more traditional context. We have followed that approach in determining what position to adopt with respect to contribution arising out of Equal Pay Act liability and in reassessing the position previously taken by the EEOC on Title VII.[14] Specifically, we have focused on whether and to what extent a contribution rule would further or detract from the policies underlying both statutes, and the impact such a rule would have on the agency's enforcement efforts. It is to these questions that we now turn.

II. AN IMPLIED RIGHT TO CONTRIBUTION WOULD UNDERMINE THE POLICIES, AND INTERFERE WITH ENFORCEMENT, OF THE EQUAL PAY ACT

A. Whether A Private Right Of Action Against Unions Exists Under The Equal Pay Act Is Subject To Doubt

Whether or not contribution would further the purposes of the Equal Pay Act, it is not available unless both the party seeking it and the party from whom it is sought could have been held liable for damages if sued by the discriminated against employee. See W. Prosser, *Handbook of the Law of Torts* § 50 (4th ed. 1971). Ordinarily, then, the proper course would be for this

---

[14] In the court of appeals, the EEOC as an *amicus curiae* took the position that contribution is available under Title VII if the contribution claim is asserted at an early stage in the aggrieved employee's suit so that conciliation may be attempted. The Commission took no position on the Equal Pay Act question since it had not yet assumed enforcement responsibility for that statute. As a result of this Court's invitation to participate on writ of certiorari, the Commission has reconsidered its position and, by formal vote, concluded that an implied right of contribution should *not* be available under either Title VII or the Equal Pay Act.

Court to consider at the threshold whether the *Laffey* plaintiffs could have brought suit against the respondent unions.[15]

---

[15] Indeed, the court of appeals' affirmance of the dismissal of this action, insofar as it is premised on Equal Pay Act liability, turned in large part on its conclusion that (Pet. App. 9d) "[i]t is improbable that an employee would ever have an implied cause of action under the [Act] against his union."

Petitioner, relying on a line of cases holding that the common liability predicate may be satisfied even if one wrongdoer's potential liability has a basis different from another's, contends (Br. 29-34) that an employer held liable under the Equal Pay Act may seek contribution from a union subject to suit under a different statute (or common law theory) without regard for whether the union is suable under the Pay Act. Since every Pay Act violation also constitutes a violation of Title VII (compare 29 U.S.C. 206(d) with 42 U.S.C. 2000e-2(h); *Schultz* v. *Wheaton Glass Co.*, 421 F.2d 259, 266 (3d Cir.), cert. denied, 398 U.S. 905 (1970); *Laffey* v. *Northwest Airlines, Inc., supra*, 567 F.2d at 445-446; *Ammons* v. *Zia Co.*, 448 F.2d 117, 119 (10th Cir. 1971)), a statute under which unions unquestionably may be sued by private parties (42 U.S.C. 2000e-5(f) and 2000e-5(g)), and since conduct violative of the Pay Act that is arbitrary or based on discriminatory or bad faith motives may also violate the union's duty of fair representation (*Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967); *Amalgamated Ass'n of Street Employees* v. *Lockridge*, 403 U.S. 274, 299, 301 (1971); *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-571 (1976)), acceptance of petitioner's argument would obviate the need at this stage of the case to consider whether an implied private right of action against unions exists under the Pay Act. The question might have to be resolved in considering the appropriate measure of contribution, however, since only the Pay Act provides for liability for liquidated damages. In any event, while we agree for the reasons stated at page 20, *infra*, that the Court need not address the question, we find petitioner's reasoning unpersuasive.

Whatever the merits in a traditional tort context of the view that common liability need not arise out of a single statute or common law tort theory, application of that principle in this context is inappropriate. As we illustrate below (see pages 18-19, 20-21, *infra*), although their coverage overlaps, the remedies provided by and rationales underlying Title VII and the Equal Pay Act are quite distinct. While these differences do not, in and of themselves, render petitioner's argument invalid, it should be recognized that the two statutes are not in all respects functional equivalents. Sec-

As we observed in our response to the petition (Br. 7-11), that question is quite knotty. There is much to suggest that Congress intended that unions would be covered by the Equal Pay Act and held accountable under it in the same manner and to the same extent as employers. The provision prohibiting labor unions from "caus[ing] or attempt[ing] to cause" employers to violate the Equal Pay Act originated in an amendment to an equal pay bill, H.R. 11677, that passed both houses of Congress in 1962 but was not enacted prior to the close of the session. Representative Zelenko, who offered the amendment, noted (108 Cong. Rec. 14766-14767 (1962)) that organized labor favored it and was "willing to be placed in this bill and to be subject to its penalties * * *." Those penalties included back wages in a suit brought against a respondent "employer or labor organization" by the Secretary of Labor. H.R. 11677, 87th

---

ondly, acceptance of petitioner's theory would provide a means of invoking Title VII while circumventing its policy in favor of conciliation and voluntary resolution of disputes. See pages 28-29, *infra*. Where the underlying claim against the party seeking contribution is premised on Title VII, an opportunity for conciliation is available, at least as between the plaintiff and the initial defendant. And were this Court to conclude, contrary to our view, that an implied right to contribution exists under Title VII, it would be appropriate to afford an opportunity for conciliation with the contribution defendant as well. However, where underlying liability is premised on the Equal Pay Act, conciliation is not statutorily required. Therefore, to permit the common liability predicate to be satisfied by virtue of a union's potential Title VII liability would be to invoke the name of that statute without incorporating its substance.

Moreover, if the Court agrees with our contention that notwithstanding union liability under Title VII contribution is not available under that statute (see pages 27-31, *infra*), it would be inappropriate to rely on union liability under Title VII as a predicate for contribution under the Pay Act. Finally, if, as we contend, unavailability of contribution under the Pay Act and Title VII is grounded in the policies of those statutes, employers should not be allowed to assert a breach of a more generalized duty of fair representation (of others) to circumvent those statutory policies.

Cong., 2d Sess. §§ 6(a), 6(d), 108 Cong. Rec. 14766 (1962). The bill did not, however, expressly contemplate a private right of action against either offender. Rep. Griffin expressed the view (108 Cong. Rec. 14752 (1962)) that labor unions "are * * * directly involved in creating the conditions or situations which are discriminatory." He therefore applauded the amendment because "labor unions are made accountable and responsible for their part, if any, in discriminating against women," and noted that the provision would make the bill "self-policing" (*ibid.*).

The bill that became the Equal Pay Act of 1963, introduced as H.R. 6060, differed from its predecessor in that it adopted the enforcement scheme of the Fair Labor Standards Act. Even so, the bill carried over the prohibition against unions' causing or attempting to cause employers to pay women less than men for equal work. As Representative O'Hara, a member of the subcommittee that drafted the final bill, stressed (109 Cong. Rec. 9209 (1963)), "if a labor organization is in any way at fault in maintaining such a discriminatory wage rate, [it] would be subject to all the penalties and all the enforcement provisions provided under the Fair Labor Standards Act."

Based on this history, it can be argued that Congress intended that unions and employers would be treated alike and would be subject to the same liabilities. On the other hand, the FLSA enforcement provisions to which Representative O'Hara alluded, insofar as they provide for repayment of illegally withheld wages, are directed solely at employers. Moreover, the very structure of the Fair Labor Standards Act, and its underlying rationale, are inconsistent with monetary recovery from unions. In essence, an employer who violates the equal pay provisions of the FLSA has, like the employer who fails to pay the statutory minimum wage, obtained services without paying full value for them. The employer thus derives a competitive advantage over companies that pay women fair value for their services. The measure of

damages under the FLSA is the difference between what an employer should have paid its disfavored employees and what it in fact did pay. In other words, the employer is reduced to competitive parity and forced to disgorge unfair profits. Furthermore, employers may be assessed an equivalent amount as liquidated damages to compensate injured employees for the delay in payment of wages. This "double damages" remedy places employer wrongdoers at a competitive *dis*advantage and thus provides an economic incentive to comply with the statute. See generally pages 20-22, *infra*.

It is difficult to see how unions fit into this scheme. Although a union certainly may "cause" an employer to adopt salary or wage differentials that violate the Equal Pay Act, it ordinarily would not benefit financially thereby. Thus, while in such circumstances the union would itself have violated the Pay Act, monetary recovery against it ordinarily would be inconsistent with the rationale of the statute as incorporated into the FLSA. The union's treasury thus would be a particularly inappropriate source from which to recover withheld wages. It is a "common fund" comprised of dues paid by the very women whose wages have been artificially depressed; by their male counterparts who presumably have been paid fair market value, but no more, for their services; and by other union members who are not in the affected job categories and may not even work for the offending employer.

Nothing in the legislative history of the Equal Pay Act reflects any awareness on the part of Congress of the tension between the expressed desire to hold unions accountable and the Act's adoption of the enforcement scheme embodied in the Fair Labor Standards Act. Nevertheless, Congress may fairly be charged with knowledge of the nature of the remedy it adopted since in merging the Equal Pay Act into the FLSA, it sought, *inter alia*, to take advantage of established procedures and standards with which industry and labor were long familiar. See 109 Cong. Rec. 9195 (1963) (remarks of Rep. Fre-

linghuysen); 109 Cong. Rec. at 9196 (remarks of Rep. Thompson); *id.* at 9207 (remarks of Rep. Carey); *id.* at 9210 (majority views introduced by Rep. Goodell); *id.* at 9216 (remarks of Rep. O'Hara). It therefore seems to us that whether a private right of action exists against unions under the statute is subject to considerable doubt.

The Court need not, however, decide that issue in this case because, in our view, there are other persuasive reasons, detailed below, for concluding that an employer who violates the Equal Pay Act should not be permitted to seek contribution from a union. Given the relative difficulty of the threshold issue and the fact that the Commission has not yet been called upon to resolve the question in a case directly presenting it, the Court may wish to reserve judgment on it.

B. Like Other Provisions Of The FLSA, The Equal Pay Act Is Designed To Prevent Employers From Engaging In Unfair Competition Through The Payment Of Substandard Wages

The Equal Pay Act, while directed to a category of employment discrimination, is an integral part of the Fair Labor Standards Act. In merging the two statutes, Congress folded the substantive provisions of the Pay Act into the preexisting statute (with Section 3 of the Equal Pay Act becoming 29 U.S.C. 206(d)), and provided (29 U.S.C. 206(d)(3)) that salary and wage differentials made unlawful by the Pay Act "shall be deemed to be unpaid minimum wages or unpaid overtime compensation under [the FLSA]."

The enforcement scheme of the FLSA is designed to deprive employers of the economic benefits they derive from paying wages below the statutory minimum, from paying women less than men for equal work, and from requiring employees to work overtime at less than the statutory rate of compensation. The FLSA also is designed to protect the competitive positions of those em-

ployers who do comply with the statute.[16] 29 U.S.C. 202 (a)(3), 216(b) and 216(c); Section 2(a)(5) of the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56; *Wirtz* v. *Malthor, Inc.*, 391 F.2d 1, 3 (9th Cir. 1968); *Hodgson* v. *Wheaton Glass Co.*, 446 F.2d 527, 535 (3d Cir. 1971); *Wirtz* v. *Jones*, 340 F.2d 901, 904-905 (5th Cir. 1965). So fundamental are these goals that employers are obligated to disgorge wrongfully withheld wages even if injured employees cannot be located, unclaimed sums being paid over to the United States Treasury. 29 U.S.C. 216(c). See *Wirtz* v. *Jones*, *supra*, 340 F.2d at 904; *Hodgson* v. *Wheaton Glass Co.*, *supra*, 446 F.2d at 535; *Burk Builders, Inc.* v. *Wirtz*, 355 F.2d 451, 453 (5th Cir. 1966).

As both the district court and the court of appeals observed (Pet. App. 6b, 10d), these statutory objectives would be disserved were employers free to offset their Equal Pay Act liability through contribution. Offending employers would retain at least part of the fruits of their illegality in that they would have obtained services without paying full value for them; law-abiding competitors would be placed at a competitive disadvantage vis-a-vis employers able to shift part of their liability onto unions; and unions that gained no economic benefit from violating

---

[16] Indeed, the stated purpose of the Act is to correct an "unfair method of competition." Section 2(a)(5), 77 Stat. 56. Federal, rather than merely state or local, regulation was needed in order to prevent interstate commerce from being "made the instrument of competition in the distribution of goods produced under substandard labor conditions." *United States* v. *Darby*, 312 U.S. 100, 115 (1941). By requiring the wages of women to be brought up to the level of those of male employees doing equal work rather than allowing the wages of the latter to be reduced (29 U.S.C. 206(d)(1)), the Equal Pay Act is premised on the sensible economic assumption that male employees are not being paid more than the fair market value for their services, and that lesser wages paid to women for equal work are therefore substandard wages.

the Equal Pay Act [17] would be called upon to disgorge non-existent profits.[18]

---

[17] Petitioner contends (Br. 36) that where a union is male-dominated, a discriminatory division of a total wage package might well benefit the union's control group without conferring any economic advantage on the employer. That contention assumes, contrary to the Act's premise (see note 16, *supra*), that the employer would agree to pay those employees wages that exceed the fair market value of their services. Moreover, the hypothetical lack of a cumulative economic advantage for the employer would not absolve it from the legal responsibility for adopting a discriminatory wage policy in violation of the Act or make it less culpable than non-controlling members of the union to whose common fund the employer seeks to transfer liability. Furthermore, petitioner's hypothetical is far from paradigmatic of the problems the Pay Act was intended to address, and suggests instead the class of abuses for which the duty of fair representation was developed. Although in such circumstances a suit in equity by the EEOC might be appropriate (see note 18, *infra*), the hypothetical posed is hardly justification for making unions subject to contribution from employers.

Petitioner's suggestion that unions ultimately benefit from artificially lowered wages—the theory being that the resultant increased demand for the employer's cheaper goods and services increases employment levels and thus union dues—bears no relationship to reality. Otherwise, it would be in a union's interest to bargain for reduced wages, so long as care was taken that its members were paid enough to cover their union dues. Obviously, incumbent union members are more interested in increasing their own paychecks than in accepting salary cuts in hope that a series of fortuities will result in an expansion of the union's treasury.

[18] Petitioner erroneously contends (Br. 27 n.17) that our reading of the statute is inconsistent with the position taken by the government in *Hodgson* v. *Sagner, Inc.*, 326 F. Supp. 371 (D. Md. 1971), aff'd per curiam on opinion below, 462 F.2d 180 (4th Cir. 1972), and *EEOC* v. *Air Line Pilots Ass'n*, 489 F. Supp. 1003 (D. Minn. 1980).

In *Sagner*, the Secretary of Labor successfully argued in a suit brough under the Equal Pay Act, 29 U.S.C. 217, that as a matter of equity the union should be required to share responsibility for back pay. After the employer had agreed to make whole female employees against whom it had discriminated, the union insisted on diverting 75% of the amount unlawfully withheld to other em-

C. A Right To Contribution Would Nullify The Economic Incentive Built Into The Equal Pay Act's Remedies To Encourage Employer Compliance

Petitioner contends (Br. 34-39) that contribution would create an incentive for employers and unions alike to refrain from gender-based wage discrimination in that in every meritorious case they would face the "reasonably certain prospect" of backpay liability no matter who the plaintiff elected to sue. We agree with the dissenting judge in *Glus* v. *G. C. Murphy Co.*, *supra*, slip op. 39, that "[i]f it w[ere] clear * * * that a right of contribution would strengthen the deterrent impact of Title VII" and the Equal Pay Act, "then there might be a judicial responsibility to make those rules which are needed to effectuate the significant national policy represented by the statute[s]." However, the matter is hardly free from doubt. A rule opposing contribution might very well maximize deterrence in that potential violators

---

ployees who had not been discriminated against. In such circumstances, equitable relief was entirely appropriate; the employer had disgorged the funds unlawfully withheld and was no longer at a competitive advantage, and the fund was misallocated at the union's insistence.

In *EEOC* v. *Air Line Pilots Ass'n*, the Commission brought suit under the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*, because the union insisted upon a benefits package that discriminated against its older members. The court held the union partially liable for back pay. Although the ADEA is similar to the Equal Pay Act in that it borrows remedies from the FLSA and treats discriminatorily withheld wages as unpaid minimum wages or overtime compensation, it is substantially different in material respects. In contrast to the Pay Act, the prevention of unfair competition was not one of Congress's purposes in passing the ADEA. See Section 2 of the Act, 29 U.S.C. 621. Moreover, the ADEA expressly authorizes courts to grant all "legal or equitable relief as may be appropriate to effectuate the purposes of [the Act]." Section 7(b) of the Act, 29 U.S.C. 626(b). See also Section 7(c) of the Act, 29 U.S.C. 626(c). The court in *EEOC* v. *Air Line Pilots Ass'n* bottomed its decision on this express grant of equity authority. The Equal Pay Act does not contain a parallel or similar provision.

might be more likely to refrain from illegal conduct knowing that they risk the full burden of a damages award rather than knowing they could spread the loss. See *Brennan* v. *Emerald Renovators, Inc.*, 410 F. Supp. 1057, 1061 (S.D.N.Y. 1975) ("no contribution" rule provides greater incentive for employers to comply with Equal Pay Act); *EEOC* v. *Ferris State College*, 23 Fair. Empl. Prac. Cas. 434, 441 (W.D. Mich. 1980) (same).

A similar debate regarding the effect of contribution on antitrust deterrence is now being waged among federal judges,[19] members of Congress,[20] participants in con-

---

[19] See *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979), petition for cert. granted *sub nom. Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, No. 79-1144 (Nov. 3, 1980) (panel majority concluding that contribution would undercut deterrence, and Judge Morgan, concurring in part and dissenting in part, asserting that the effect of contribution on deterrence is, at best, inconclusive); *Professional Beauty Supply, Inc.* v. *National Beauty Supply Inc.*, 594 F.2d 1179 (8th Cir. 1979) (panel majority maintaining that on balance contribution buttresses deterrence, and Judge Hanson, dissenting in part, concluding that the arguments on both sides of the deterrence question are inconclusive); *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979-2 Trade Cas. (CCH) ¶ 62,995 (10th Cir. 1979) (panel majority indicating that the effect of contribution on deterrence is indeterminative or speculative, and Judge Holloway, concurring in part and dissenting in part, adopting the panel majority view in *Professional Beauty Supply* that contribution would bolster deterrence); *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F. Supp. 1339, 1346 (S.D.N.Y. 1969) (declaring that contribution would thwart the statutory purpose of treble damage actions); *El Camino Glass Co.* v. *Sunglo Glass Co.*, 1977-1 Trade Cas. (CCH) ¶ 61-533 (N.D. Cal. 1976) (concluding that a "no contribution" rule safeguards antitrust deterrence).

[20] Compare views of the Senate Judiciary Committee majority on a pending bill, S.1468, S. Rep. No. 96-428, 96th Cong., 1st Sess. 17-19 (1979) (hereinafter "Senate Report") (concluding that contribution in price-fixing cases can strengthen deterrence), with supplemental views of Senators Kennedy and Metzenbaum, at 29, 32 (insisting that the proposed contribution remedy and its corollary of mandatory claims reduction may undercut deterrence).

gressional hearings,[21] and commentators.[22]

Given the lack of consensus on this issue, the assertion that contribution would deter Title VII and Equal Pay Act violations is wholly speculative and cannot justify judicial creation of the right. Cf. *Ferri* v. *Ackerman*, 444 U.S. 193 (1979) (while absence of immunity in state malpractice suit for attorneys appointed pursuant to Criminal Justice Act may dissuade members of private bar from accepting representation, the argument raises questions more appropriately answered by legislative body acting on the basis of empirical data).

Whatever the merits in other contexts of the debate over whether potential wrongdoers would more likely be deterred by the reasonable certainty that they will not get off "scot free" than by the risk of liability for

---

[21] See *Hearings on S.1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979) (hereinafter "Senate Hearings"): statement of John Shenefield, Assistant Attorney General, Antitrust Div., Dept. of Justice (expressing the view that contribution may weaken the deterrent to intentional violators); testimony and statement of Lowell E. Sachnoff; testimony and statement of Harold E. Kohn; statement of Donald J. Polden; and letter to Senate Judiciary Committee from Mark Green, director, Congress Watch, all asserting that contribution will undermine deterrent against intentional antitrust violations. Compare statement and testimony of Robert P. Taylor, director, ABA task force on contribution; statement of Donald G. Kempf; testimony of Donald Hibner (arguing that contribution may aid deterrence and that a "no contribution" rule is ineffectual because businessmen are ignorant of the rule and hence do not consider it in their actions).

[22] See Note, *Contribution in Private Antitrust Actions*, 93 Harv. L. Rev. 1540, 1544-1548 (1980) (concluding that contribution would not materially reduce deterrence); Easterbrook, Landes, and Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, presently scheduled for publication in the October 1980 issue of the Journal of Law and Economics (concluding that contribution would not increase deterrence); Rose, *Contribution In Antitrust: Some Policy Considerations*, presently scheduled for publication in the Antitrust Law Journal (1980) (concluding that the effects of contribution on deterrence are indeterminate).

maximum (and disproportionate) damages, the Equal Pay Act's built-in disincentive to employer misconduct would be seriously undermined were contribution available. In addition to permitting employees to recover the difference between what they actually earned and what they would have earned absent the violation, the FLSA provides (29 U.S.C. 216(b)) that an employer who violates the substantive provisions of the statute, including those requiring equal pay for equal work, "shall be liable * * * in an additional equal amount as liquidated damages." Designed primarily to compensate employees for consequential damages (*Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 707-708 (1945); *Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572, 583-584 (1942)), liquidated damages serves as a true deterrent to unlawful conduct by compelling an employer to disgorge an amount greater than the wages it unlawfully withheld. Absent this liability for "double damages," an employer would risk nothing by violating the statute. For so long as it escaped detection and enforcement, it would enjoy a competitive advantage over nonviolators. Once sued, it need only do what the statute commanded it to do in the first place—eliminate the pay differential and restore sums unlawfully withheld. Attempted violation would thus risk nothing more than a restoration to competitive parity. In contrast, liability for double damages operates to the violator's competitive disadvantage, and thus constitutes the "spur or catalyst" encouraging compliance. Cf. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975). By permitting an employer to shift part of that cost to a union, contribution would dissipate or destroy the Act's deterrent effect.

We submit, therefore, that a right to contribution should be rejected under the Equal Pay Act in order to preserve the Act's economic disincentive for employer misconduct. In taking this position, we are not unmindful of the need to hold unions to their statutory obligation to refrain from causing or attempting to cause employers to violate the Act. Should it ultimately be decided that

unions are subject to Pay Act damages suits by their members (see pages 15-20, *supra*), they will face the same exposure as employers. No matter how that question is resolved, unions are subject to employee damages suits (but not liquidated damages) under Title VII and, where appropriate, the duty of fair representation; to EEOC suits seeking injunctive relief (29 U.S.C. 217); and in flagrant cases to a Commission suit for damages (*Hodgson* v. *Sagner, Inc., supra*).

III. A RIGHT TO CONTRIBUTION WOULD UNDERMINE THE POLICIES, AND INTERFERE WITH ENFORCEMENT, OF TITLE VII

A. A Right To Contribution Would Nullify Commission Efforts To Encourage Compliance With Title VII Through The Exercise Of Prosecutorial Discretion

After a two-year study of ways to encourage voluntary compliance with Title VII, the EEOC recently adopted a policy designed to encourage good faith efforts "of a compelling and aggressive nature" by employers or unions to eliminate discriminatory employment practices when their bargaining partners oppose voluntary compliance. As one incentive, the Commission resolved that in appropriate cases a party's good faith or unilateral efforts should shield it from government prosecution. See Title VII and Collective Bargaining: Proposal and Resolution To Encourage Voluntary Efforts, Daily Lab. Rep. (BNA) D-1 (Apr. 2, 1980) (App., *infra*).

Where the Commission for these reasons elects to sue only one signatory to a discriminatory collective bargaining agreement, if that defendant were permitted to litigate a contribution claim against its bargaining partner the government's prosecutorial discretion would be nullified and the policy described above undermined. While such third-party defendants might in many cases succeed in resisting contribution claims, in some circuits good faith efforts to eliminate discriminatory practices

might not be a sufficient defense.[23] In any event, the risk of third-party liability and of the costs and efforts associated with resisting such liability would discourage employers and unions from the very efforts to expose and oppose discrimination that the Commission is seeking to encourage.[24]

B. A Right To Contribution Is Not Compatible With Title VII's Twin Objectives Of A Preference For Conciliation And An Opportunity For Effective Enforcement

1. The charge-filing requirements of Title VII and the statute's entire administrative scheme [25] reflect Congress's judgment that parties subject to liability should have an opportunity to resolve the matter in controversy prior to litigation. Accordingly it often has been recognized that in enacting Title VII Congress "selected '[c]ooperation and voluntary compliance * * * as the preferred means for achieving' the goal of equality of employment opportunities." *Occidental Life Insurance*

---

[23] For example, the courts of appeals have split regarding the grounds for holding unions monetarily liable for discriminatory provisions in collective bargaining agreements. Language in several cases suggests that a union can avoid Title VII back pay liability by negotiating actively for a nondiscriminatory contract. See, *e.g.*, *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 989 (D.C. Cir. 1973); *Johnson* v. *Goodyear Tire and Rubber Co., Synthetic Rubber Plant*, 491 F.2d 1364, 1381-1382 (5th Cir. 1974). However, in other cases in which unions attempted without success to negotiate nondiscriminatory contracts, the courts have held them strictly responsible for the results of their negotiations. See, *e.g.*, *Myers* v. *Gilman Paper Corp.*, 544 F.2d 837, 848-849 (5th Cir.), modified on rehearing, 556 F.2d 758, cert. dismissed, 434 U.S. 801 (1977); *Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 270-271 (4th Cir.), cert. denied, 429 U.S. 920 (1976). See generally Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702 (1980).

[24] Of course the EEOC cannot, and should not, immunize employers or unions from Title VII suits brought by private parties. Such private suits, however, are not commonly brought in duplication or supplementation of active Commission enforcement efforts.

[25] See 42 U.S.C. 2000e-4(g)(4); 2000e-5(b), 2000e-5(f)(1), and 2000e-5(f)(2).

Co. v. *EEOC*, 432 U.S. 355, 379 (1977), quoting *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). To the extent that contribution claims could be asserted against parties neither named in a charge nor otherwise afforded an opportunity to conciliate,[26] a right to contribution would defeat this congressional policy.

Contribution, moreover, may deter settlement even when all parties are afforded an opportunity to conciliate. The incentive to settle undoubtedly is lessened if a settling defendant (or potential defendant) faces a future claim for contribution by a defendant subsequently held liable to a charging party. See generally *Restatement (Second) of Torts* § 886A, Comment (1979); W. Prosser, *Handbook of the Law of Torts* § 50, at 309-310 (4th ed. 1971); Note, *Contribution Among Antitrust Violators*, 29 Cath. L. Rev. 669, 672-675 (1980). If settling defendants are *not* subject to contribution and the liability of non-settlors is reduced only by the amount of the settlement, collusion among the settling parties would be encouraged. Moreover, such a rule would defeat the primary purpose of contribution—the equitable distribution of damages among jointly responsible tortfeasors—since even in the absence of collusion parties almost always settle for less than their proportionate share of the liability. If, on the other hand, the liability of non-settlors is reduced by an amount equal to the settlors'

---

[26] The EEOC involves a union in conciliation as a matter of course when it appears from the face of a charge that a collective bargaining agreement is involved. *EEOC Compliance Manual* (CCH) § 62.7(c) (1979). However, where the practice alleged to be discriminatory is not memorialized in an agreement, a union might not be impleaded as a contribution defendant until the middle of the litigation or, as here, might be sued in a separate action. In such circumstances, it would have had no opportunity to conciliate.

Unions and employers are not the only possible contribution defendants. Agents, corporate subsidiaries and parents, and employment agencies may also be liable under Title VII (42 U.S.C. 2000e-5(a), (c)) and, hence, fair game for contribution. They rarely will have had the opportunity to conciliate.

equitable share of the joint obligation, the injured party's total recovery would depend on how much of the blame for the violation is attributed to the settling defendants who would not be present at trial to assure an accurate account. The non-settlors would, of course, have every incentive to shift the blame to their settling co-tortfeasors, to the ultimate disadvantage of the plaintiffs. In these circumstances, the plaintiffs might well conclude that the best course is to proceed to trial against all defendants: a trial cannot be avoided so long as some defendants refuse to settle; a trial against the holdouts would be nearly as complex as one against all defendants in view of the need to determine equitable shares of liability; only by taking on all parties could the plaintiffs assure themselves full recovery.

2. Finally, contribution would complicate Title VII actions to the detriment of private plaintiffs. Title VII plaintiffs typically are persons of relatively limited means, assisted, if at all, by counsel who are court-appointed or privately retained on a contingency fee basis. A contribution rule would, as a practical matter, force them to combat not only one defendant, but all third-party contribution defendants who have been impleaded or have intervened in the action.[27] Each of these defendants likely would have financial resources far superior to the plaintiff's, and each would have an interest in defeating the plaintiff's claim as well as the contribution claim.

As a consequence of the expanded scope of the litigation, the amount of discovery (both offensive and defensive) would increase, trial preparation would become more extensive and difficult, new defensive issues would

---

[27] Even if not impleaded, potential contribution defendants might well elect to intervene in the Title VII proceeding rather than await a separate contribution action like the instant one, reasoning that their chances of defeating the plaintiff would surpass their chances of defeating the Title VII defendant turned contribution-plaintiff because of the latter's greater litigating resources and its superior access to evidence.

arise (see page 12, *supra*), and trial time would lengthen.[28]

These problems of course would not exist where contribution is sought in a separate proceeding. However, such proceedings would make poor use of scarce judicial resources by greatly proliferating Title VII suits without a corresponding increase in statutory enforcement. Furthermore, they would virtually foreclose any opportunity for conciliation between the contribution defendants and the Title VII plaintiffs whose suit for damages exposed them to liability.

For all these reasons, we submit that a right to contribution would not be compatible with the statutory policies of Title VII.

CONCLUSION

The judgment of the court of appeals, insofar as it pertains to the Equal Pay Act, should be affirmed. In all other respects, the judgment should be vacated and the case remanded with instructions to dismiss.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

LEROY D. CLARK
General Counsel
Equal Employment Opportunity Commission

HARLON L. DALTON
Assistant to the Solicitor General

NOVEMBER 1980

[28] In addition to having these disadvantages, the course advocated by the Commission in the court below—that contribution claims be allowed only if asserted early enough to allow the plaintiff's suit to be held in abeyance while there is an opportunity for Commission conciliation with the third-party defendant—would unfairly delay the plaintiff's suit and deflect limited Commission resources into conciliation efforts not requested by either party to the conciliation. On reflection, we believe that course would impede the effective enforcement of Title VII and accordingly would be incompatible with its statutory policies.

APPENDIX

TITLE VII AND COLLECTIVE BARGAINING: PROPOSAL AND RESOLUTION TO ENCOURAGE VOLUNTARY EFFORTS

Pursuant to a Commission approved resolution adopted May 30, 1978, a special task force was formed to examine policy proposals that, if approved by the Commission, would promote Title VII objectives within the context of collective bargaining. The goal would be to spur unions and employers to undertake initiatives voluntarily towards eliminating discriminatory employment practices, including unilateral efforts by one party where the other party is uncooperative.

In part, the resolution was a response to the frustration of both unions and employers who seek to engage in good faith efforts in behalf of Title VII. Frequently they perceive themselves as exposed to liability for the discriminatory acts of the other but, because of their symbiotic relationship, are also hamstrung as regards effective independent action. They are reluctant not only to act, but, aware of no Commission policy to recognize such efforts, even to respond to activity not entirely within their control. As a consequence, this project was launched to pursue discussions with employer and union groups that raised issues and problems bearing on the overall objective. Such meetings have progressed over a stretched out time frame. They were generally fruitful in clarifying and identifying issues and tasks necessary to be addressed for purposes of the Commission's mandate.

In the interim and with rather fortuitous timing, the Supreme Court delivered its opinion in *United Steelworkers of America, AFL-CIO* v. *Weber, et al.*, —— U.S. ——, 99 S. Ct. 272 (1979), where the Court endorsed resort to the collective bargaining forum between a union and employer as an appropriate and effective means for developing and implementing voluntary affirmative action plans.

During this time also, the National Labor Relations Board decided *Westinghouse Electric Corp.*, 239 NLRB No. 19 (1978) and *East Dayton Tool and Dye Company*, 239 NLRB No. 20, 1978), holding that unions are entitled to receive EEO data from the employer. This line of case law gives the "green light" to both unions and employers to engage actively in voluntary affirmative action by providing the legal support and insulation for such specific endeavors.

Weber is especially pertinent. It was enough for the Court that Kaiser and the union, by reasonable action, had endeavored to break down old patterns of racial segregation. This means that employers and unions are free to urge a response to Title VII and use their own facilities to meet their own particular needs without concerning themselves with the issue that such endeavors will be tacitly construed as an admission of past discrimination or whatever. A good deal of industry is unionized. Management and union partnerships ought to be stimulated to dedicate themselves to prospective changes in the work force. What motivated Kaiser and the Steelworkers is repeated throughout American industry. However, if only one of the partners is a willing advocate to such undertakings, it becomes imperative for government to find a means of assisting unions and management despite the resistance they may encounter from their collective bargaining partner.

As the cases are beginning to lend weight and credence to voluntary endeavors, the Commission should do whatever it can to make it within the self interest of unions and management to take voluntary action. Indeed pursuing such a policy would be in keeping with the Commission's recent strategy initiatives that encourage voluntary efforts. Such strategies include the "Bottom Line" policy as part of the Uniform Selection Guidelines, targeting offenders for systemic enforcement efforts on a "worst-first" priority basis and seeking to insulate employers who engage in affirmative action with EEOC's

Guidelines on Voluntary Affirmative Action. Accordingly, the following recommendations are urged to begin the process.

I. *Fundamental Policy*

The basic policy underlying the strategy must be that the Commission, its processes and procedures, will recognize the "good faith" efforts of unions and/or employers towards eliminating discrimination, *particularly* where either party has to act alone and without the cooperation of the other. Fundamentally, this would simply be another manifestation of the Commission's prosecutorial discretion. Pursuant to such a policy, the Commission would seek to cooperate with a union (in appropriate circumstances) filing charges against an employer. Similarly, the Commission would support an employer's voluntary compliance efforts.

The level and kinds of activity necessary to establish "good faith" efforts will have to be evaluated on a case-by-case basis. Mere token gestures are insufficient. The Commission will be looking for concerted, aggressive action of a compelling nature. The Commission will have to be flexible in its approach to this question since the exigencies of the bargaining process do not allow for simple resolutions to what is a very complex problem. However, this difficulty should not prevent the Commission from taking what is essentially the only rational approach.

The appropriateness of recognizing a party's good faith efforts has most recently been endorsed by the Ninth Circuit Court of Appeals in *Social Services Union, Local 535* v. *County of Santa Clara*, 21 FEP 684 (1979). The court held that because of the union's initiatives prior to filing suit it could be the class representatives of its members in Title VII litigation despite the fact that it was a signatory to the collective bargaining agreement containing the challenged discriminatory provisions. In so holding, the court stated that it was reasonable for

the unions to believe that "their vigorous efforts to correct discrimination . . . would protect them from liability for backpay if the suit succeeded."

See also *Burwell* v. *Eastern Airlines*, —— F.Supp. ——, 17 FEP 1687 (D. Va. 1978) where the court found union liability for being signatory to a collective bargaining agreement with discriminatory provisions and for failing to take adequate steps to challenge those provisions. However, because the court found that Eastern unilaterally imposed the unlawful provisions to which the union acquiesed under protest, and because of other union good faith efforts, the court did not award backpay against the union.

II. *Impact of Policy on Commission Program*

Programmatically, the policy would manifest itself at two primary administrative junctures: a) during charge processing, and b) during litigation. There is already Commission precedent for both, but such recognition occurs only on an *ad hoc* basis. As a consequence, the Commission is perceived as having an insufficient understanding of the dynamics involved. Only with a clearly articulated strategy designed to implement a specific policy can the Commission expect to exert any influence.

A. *Charge Processing*: It became apparent through discussions and correspondence with unions and employers that Commission staff operations need to have more specific instruction regarding the status of parties within the context of Title VII. Some field staff have failed to appreciate that there are gradations among parties in the context of assigning culpability. Unions, for example, can file as charging parties under the statute. But, there have been times when staff have "requested" that unions withdraw as charging parties or have refused to accept their charges. There is, therefore, considerable frustration with the apparent inability of the Commission to respond in a *positive* manner to union efforts to file charges. One union actually was com-

pelled to bring a civil suit against the Commission last year to insure acceptance of charges filed by itself as an aggrieved person. At times, some of these problems have been administratively addressed through field directives and, indeed, an investigative manual is currently being developed that will contain a chapter on unions.

It is urged that the Commission issue such instructions through the upcoming manual, through "Field Notes," the Compliance Manual, and any other appropriate instrument to establish a cumulative policy that will take advantage, *where feasible*, of union (or employer) efforts and resources in pursuing Title VII claims. It should be noted that this is, in fact, the policy as stated in "Field Notes" 904-15, but it is not stated clearly or effectively. As a consequence, field staff often appear uninformed or disinterested in helping unions effectively challenge discriminatory practices. This is not intended as a criticism of field staff. They have had a complex and difficult task absorbing the new procedures and harmonizing the different area jurisdictions now handled by them. The point is simply that better guidance to the field is definitely needed so they become familiar with and understand strategy and policy at the charge processing level. Standards should be developed by which the field, starting from intake and throughout charge processing, can better recognize the appropriate role for a union, whether as charging party or respondent in the Commission process.

Additionally, it will be necessary to develop more comprehensive investigative records to allow for more critical analysis at the litigation review stage.

It is *not* here being suggested that the agency revert to old habits of letting others (indirect parties) determine the Commission class action case load or otherwise direct its resources. Rather, it is being urged that unions and employers not be ignored in any efforts that stimulate voluntary compliance or efforts that serve to gather

and contribute considerable evidence on Title VII practices. The Commission should support such efforts, not thwart them.

Institutionally, the offices of Field Services, Policy Implementation, and General Counsel are involved, since they share the responsibility for developing and issuing the written guidance to the field. Jointly, they should be directed to modify and adjust their functions and missions so as to *affirmatively* reflect this policy.

B. *Litigation Review Process*: As a means of further encouraging unions and employers to initiate voluntary affirmative action, the Commission should, in recognition of a party's "good faith" or unilateral efforts to eliminate discriminatory practices, exercise its prosecutorial discretion where appropriate. As stated before, the measure of "good faith" that triggers such prosecutorial inhibition will necessarily have to be determined on a *case-by-case* basis since union-employer relationships are so varied. A "good faith" standard, however amorphous, might be developed with reference to the NLRB's similar policy on employers charged with unfair labor practices because of unilateral action taken by them in the face of union recalcitrance.

Recently, a recommendation for intervention presented a case susceptible to such treatment. An employer sought to unilaterally make a seniority rule change in an effort to come into compliance with the Age Discrimination Act that was resisted by the bargaining union. There are also examples of successful voluntary employer and/or union activity as manifested by programs initiated by the IUE and the Woodworkers Unions. Programs of this type might be encouraged by a Commission policy that rewards such endeavors.

Accordingly, it is recommended that in seeking litigation approval to institute actions against parties to collective bargaining agreements, the Office of General Counsel address separately and distinctly the question of voluntary affirmative action on the part of unions and/or em-

ployers, including the issue of "good faith" efforts, degree of culpability and so forth. Similarly, the failure to take such actions should be noted as well as an aid to the Commission in its litigation determinations.

Conclusion

In keeping with the Commission's own strategies for emphasizing and promoting voluntary acts as a preferred means of advancing equal employment opportunities, it would be appropriate to focus on the collective bargaining process as a unique forum arising at the threshold of the employment relationship. Commission strategy must provide encouragement as well to voluntary acts in those instances where efforts to achieve joint union-employee cooperation might otherwise appear futile.

The attached resolution is offered as the vehicle for framing Commission policy on this matter and as the authority for the steps needed to implement such policy.

* * * *

COMMISSION RESOLUTION TO ENCOURAGE VOLUNTARY AFFIRMATIVE ACTION

Whereas, the Equal Employment Opportunity Commission has a responsibility to encourage voluntary endeavors to eliminate discriminatory employment practices,

Be it resolved that, in order to encourage such voluntary endeavors by unions and employers, the Commission hereby consolidates and adopts the following policy:

1. Through its administrative processes, the Commission shall recognize the "good faith" efforts of unions and employers to eliminate discriminatory employment practices, whether undertaken in cooperation with each other or unilaterally; "good faith" must be of a compelling and aggressive nature evaluated on a case by case basis;

2. When engaged in investigation, conciliation, and enforcement, the Commission shall exercise its discretion

in recognition of union or employer voluntary affirmative action that meets appropriate standards;

3. In order to implement this policy, the Offices of Field Services, Policy Implementation and the General Counsel shall develop, amend, and modify written instruction to the field staff that clearly reflects this policy with the understanding that criteria necessary to establish the standard of "good faith" as expressed above, shall be approved only by the Commission and,

4. The Office of the General Counsel, when engaged in enforcement activity and in exercising the Commission's discretionary enforcement authority, shall consider and evaluate voluntary affirmative action endeavors of potential union and/or employer respondents in accordance with paragraph 3 above.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 331872 114